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(PARTLY FOUNDED ON "BLACKSTONE.")

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NEW COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK IV.

OF PUBLIC RIGHTS—*(continued)*.

PART III.

OF THE SOCIAL ECONOMY OF THE REALM.

We have now, in our examination of Public Rights, treated successively of the *Civil Government* and of the *Church;* but there are certain other institutions which belong equally to the Division of Public Rights. And as these relate immediately to the community at large or to large classes of it, they may without impropriety be comprised under the general name of *Social Economy of the Realm*. Under this head will be included the system of Local Government, which was brought into existence mainly by statutes of the nineteenth century. For historical and legal reasons, which will appear as the subject unfolds itself, we shall start with the general law of corporations, and then, after a discussion of the commercial bodies which are incorporated under the Companies Acts, we shall proceed to municipal corporations and to other local authorities which have been largely modelled upon the municipal code. In this way a description will be given of the local administration of many important public statutes.

CHAPTER I.

OF CORPORATIONS IN GENERAL.

CORPORATIONS are artificial persons, recognized or constituted by the law, and endowed by it with the capacity of perpetual succession (*a*). They have been created for various purposes, such as the advancement of religion, of learning, and of commerce.

The original invention of corporations is commonly attributed to the antient Romans; and however that may be, they were much developed by the Roman civil law, and were recognized also by the canon law, whence our own spiritual corporations are derived.

[Corporations are, with us, either *aggregate* or *sole*. Corporations *aggregate* consist of many persons united together into one society, of which kind are the mayor and commonalty of a city, the dean and chapter of a cathedral church, and the like. Corporations *sole* consist of one person only and his successors; of which kind are the monarch, all bishops, all rectors and vicars (*b*), and the like. As regards a rector or vicar in particular, the endowments of the living are vested in him as for a freehold estate; and this freehold, if vested in him in his natural capacity, would on his death have descended to his heirs, who might or might not have been compellable to convey it to the next incumbent. At the best, the conveyance would have been attended with expense and trouble, to be repeated again and again on every change of incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* parson, shall never die, any more

(*a*) *Vide sup.* vol. I. pp. 260, 276.

(*b*) Co. Litt. 43 a.

[than the king, by making him and his successors a corporation. By which means all the rights of the parsonage are preserved entire to the successor; for the present incumbent, and his predecessor who lived eight centuries ago, are in law one and the same person. And what was given to the one, was given to the other also.

Again, corporations are either *ecclesiastical* or *lay*. In ecclesiastical or spiritual corporations the members are entirely spiritual persons, such as bishops, parsons, and the like (who are corporations sole), or such as deans and chapters (who are corporations aggregate). Lay or temporal corporations are either *civil* or *eleemosynary*, those which are erected for temporal purposes (mostly of a commercial character) being called *civil*, and those which have been created for the perpetual distribution of alms being called *eleemosynary*. Instances of *civil* corporations are the trading companies (or guilds) of London and other towns established for the regulation of manufactures and commerce, the Royal College of Physicians, the Royal College of Surgeons of England, the Royal Society, and the Society of Antiquaries. The Universities of Oxford and Cambridge are also *civil* corporations (*c*); it being clear that they are not *ecclesiastical*, but *lay* corporations, since they are composed of more laymen than clergy, and that they are not *eleemosynary* foundations, though stipends therein are annexed to particular professors, for such

(*c*) *Rex* v. *Cambridge* (*Vice-Chancellor*) (1765), 3 Burr. 1656. Under the Oxford University Act, 1854, the government of the university of Oxford is mainly vested in the *Hebdomadal Council*, a body consisting of twenty-two persons, of whom four are *ex officio* members (the chancellor, vice-chancellor, and the two proctors), and the other eighteen are elected, viz., six by the heads of houses, six by the professors, and six by masters of arts of not less than five years' standing. Under the Cambridge University Act, 1858, the government of the university of Cambridge is vested in the *Council of the Senate*, consisting of eighteen persons, of whom two are *ex officio* members (the chancellor and the vice-chancellor), and the other sixteen are elected, viz., four heads of colleges, four professors, and eight other members of the senate.

[stipends are rewards *pro opere et labore*, as in the case of the salaried officials of ordinary civil corporations. Among *eleemosynary* corporations may be mentioned hospitals for the maintenance of the poor, sick, and impotent; also, all colleges, whether of university rank or not, which are founded (1) for the promotion of piety and learning, and (2) for affording assistance to the members, in order to enable them to prosecute their studies. Eleemosynary corporations, though in some things partaking of the nature of ecclesiastical bodies, are lay and not ecclesiastical, even though composed of ecclesiastical persons (*d*); and accordingly, they are not subject to the jurisdiction of the Ecclesiastical Courts, or to the visitation of the ordinary (or diocesan) in his spiritual character (*e*).

Having thus enumerated the varieties of corporations, we will next proceed to consider—I. How corporations are created; II. Their powers, capacities, and incapacities; III. How they are visited; IV. How they are dissolved.

I. Corporations were created under the civil law by the mere *voluntary* association of the members, unless the object of the association were contrary to law, in which case the corporation would have been *illicitum collegium* (*f*). But in England, and according to the English law, the king's consent is absolutely necessary to the erection of any corporation. This consent of the Crown may be either *implied* or *express;* being implied, in the case of corporations which exist by force of the *common law* or by *prescription* (*g*), and being *express*, when given either by Act of Parliament or by charter, or by both (*h*). Thus, the charter of the Royal College of Physicians, (of the

(*d*) *Philips* v. *Bury* (1694), 1 Ld. Raym. 6.

(*e*) Blackstone (ed. Christian), vol. i. p 471 (note).

(*f*) Dig. 47, 22, 1.

(*g*) 2 Inst. 330.

(*h*) By the College Charter Act, 1871 (34 & 35 Vict. c. 63), the Crown's charter for the foundation of any new college or university is to be laid before parliament for a period of not less than thirty

[tenth year of Henry the Eighth,) was confirmed by the 14 & 15 Hen. VIII. (1523), c. 5 (*i*) ; and the corporation of the Bank of England was created by the Crown, under the powers of the 5 & 6 W. & M. (1694), c. 20.] Municipal corporations are also created by charter of the Crown under the provisions of the Municipal Corporations Act, 1883. But the power of parliament has of late been most frequently invoked for the incorporation of public and other trading companies. Nevertheless the Crown, acting of course on the advice of a responsible minister, may still erect a corporation by its own charter or letters patent. Thus, in 1889, the British South Africa Company was "constituted, erected and incorporated . . . by our "prerogative royal and of our especial grace." When such companies are erected by special Act of Parliament, the special Act usually incorporates one or more of the relevant general Acts noted below (*k*), the special Act defining, of course, the objects for which the company is incorporated, conferring special powers on the company, and usually limiting a time within which these powers are to be exercised. The special Act may also impose such other restrictions as the nature of the case may require.

days before the report of the Privy Council thereon is submitted to his Majesty.

(*i*) *Dr. Bonham's Case* (1608), 8 Rep. 107.

(*k*) The Companies Clauses Acts, 1845—1889; The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); The Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16); The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17); The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27); and the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). Some of these Acts have since been variously amended, namely, The Lands Clauses Consolidation Act, 1845, by 23 & 24 Vict. (1860), c. 106; 32 & 33 Vict. (1869), c. 18; 46 & 47 Vict. (1883), c. 15, and 58 & 59 Vict. (1895), c. 11; and The Waterworks Clauses Act, 1847, by 26 & 27 Vict. (1863), c. 93. See also the Telegraphs Act, 1863 (26 & 27 Vict. c. 112), amended by 29 & 30 Vict. (1866), c. 3; The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); The Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120); The Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121).

[The creation by the Crown of a body corporate may be performed by the words *creamus*, *erigimus*, *fundamus*, *incorporamus*, or the like; nay, it has been held, that if the Crown grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly (*l*), this is also sufficient to incorporate and establish them for ever (*m*).

The Crown, it is said, may grant to a subject the power of erecting corporations, though the contrary was formerly held (*n*). That is, the Crown may permit the subject to name the persons and powers of the corporation at his pleasure; but, in such a case, it is really the king that erects, and the subject is but the instrument. For, though none but the Crown can make a corporation, yet *qui facit per alium, facit per se;* and in this manner, the Chancellor of the University of Oxford has power by charter to erect corporations, and has exercised it by the erection of matriculated companies of tradesmen subservient to the students.

When a corporation is erected, a name is always given to it, or, if none is actually given, a name will attach to it by implication (*o*). And by that name alone, it must sue and be sued and do all legal acts, although a minute variation therein is not material; and the name is capable of being changed, by competent authority (*p*), without affecting the identity or capacity of the corporation in other respects (*q*). But some name is of the very being of its constitution (*r*); for the name of incorporation, says Sir E. Coke, is as a proper name, or name of baptism.

(*l*) *Gild* signified among the Saxons a fraternity; and such gilds as were commercial gradually took the shape of our present municipal corporations, with a place of meeting called the *Guild-hall*.

(*m*) *Sutton's Hospital Case* (1612), 10 Rep. 30; 1 Roll. Ab. 513.

(*n*) Bro. Ab. tit. *Prerog.* 53; Vin. *Prerog.* 88, pl. 76; Y. B., 2 Hen. 7, 13; *R.* v. *Coopers Company* (1798), 7 T. R. 548.

(*o*) *Anonymous* (1700), 1 Salk. 191.

(*p*) Companies Act, 1862, s. 13.

(*q*) *Luttrel's Case* (1601), 4 Rep. 87.

(*r*) Gilb. *Hist. C. P.* 182,

[And therefore when a private founder gives his college, or hospital, a name, he does it only as a godfather. And by that same name, the king baptizes the corporation (*s*).

II. A corporation has divers powers and rights, capacities and incapacities, the greater part of which are applicable only to corporations *aggregate*, though some belong to either class. Thus,—(1.) A corporation aggregate may sue or be sued, implead or be impleaded, grant or receive, and perform any act, by the corporate name, as a natural person may by his individual name. (2.) A corporation is amenable to such judgments as shall be given against it in any action, but in respect only of the corporate property, and not so as to fix the corporators with individual liability (*t*). (3.) The acts of a corporation aggregate must, in general, be under its common seal. For, being an invisible body, it cannot manifest its intentions by any personal act or oral discourse; and therefore it acts and speaks only by its common seal, the affixing of the seal, and that only, uniting the several assents of the individual corporators, and making one joint assent of the whole (*u*).] But there are cases in which convenience has introduced exceptions to this rule,—*e.g.*, a company incorporated for the purposes of trade may do any act in the ordinary course of its business, without using its common seal (*x*); and an action will lie against a corporation on an *executed* contract of which it has received the benefit, although such contract was not under the common seal (*y*). Further,

(*s*) 10 Rep. 28.

(*t*) The maxim of the civil law is the same: "*Si quid universitati "debetur, singulis non debetur; nec "quod debet universitas, singuli "debent.*" (Dig. 3, 4, 7.)

(*u*) Dav. 44, 48; *Arnold* v. *Mayor of Poole* (1842), 4 Man. & Gr. 860; *Young* v. *Corporation of Leamington* (1883), 8 App. Ca. 517; *Governor and Company of Copper Mines* v. *Fox and Others* (1851), 16 Q. B. 229; *Diggle* v. *London and Blackwall Rail. Co.* (1850), 5 Exch. 442.

(*x*) *South of Ireland Colliery Co.* v. *Waddle* (1869), L. R. 4 C. P. 617.

(*y*) *Beverley* v. *Lincoln Gas Co.* (1837), 6 A. & E. 829.

under the statutes which control local authorities, the corporate seal is frequently required to be affixed only in case of contracts exceeding 50*l.* in value. (4.) [A corporation aggregate may make by-laws and regulations for its own better government; and these, unless contrary to the laws of the land (*z*), or contrary to or inconsistent with their charter (*a*), or manifestly unreasonable (*b*), are binding on the members. For, as natural reason is given to the natural body for the governing of it, so by-laws or statutes are a sort of political reason to govern the body politic:] and this right is so much of course, that where a charter of incorporation gave power to make by-laws as to specified matters, the body at large was held nevertheless to have the power to legislate with regard to all matters not so specified (*c*). And every corporation has the right to alter or repeal the by-laws which itself has made (*d*). (5.) Among the incidents of a corporation aggregate may also be classed the *disabilities* to which it is subject, of which the following are the most important:—[The corporation must always appear in court by attorney (*e*); it cannot be executor or administrator, nor, indeed, perform any personal duties; it cannot be seised of lands to the use of another (*f*);] and it can be guilty of no crime in its

(*z*) *R.* v. *Coopers Company*, (1798), 7 T. R. 543; *Ipswich Taylor's Case* (1614), 11 Rep. 53.

(*a*) *Rex* v. *Cutbush* (1768), 4 Burr. 2204.

(*b*) *Piper* v. *Chappell* (1845), 14 M. & W. 624; *R.* v. *Powell* (1854), 3 El. & Bl. 377; *Kruse* v. *Johnson*, [1898] 2 Q. B. 91 (a county council by-law).

(*c*) *R.* v. *Westwood* (1830), 7 Bing. 1; 4 Bligh (N.S.) 213; S. C., 4 B. & C. 781.

(*d*) *R.* v. *Ashwell* (1810), 12 East, 22.

(*e*) Hence a corporation, when required to give discovery of documents, does so by some officer of the corporation in that behalf appointed by the Court (Order xxxi. r. 5; *Berkeley* v. *Standard Discount Co.* (1879), 13 Ch. D. 97; *Mayor of Swansea* v. *Quirk* (1879), 5 C. P. D. 106); and a corporation obtains such discovery on the affidavit of its solicitor, where an affidavit is required (*Kingsford* v. *Great Western Rail. Co.* (1864), 16 C. B. (N.S.) 761).

(*f*) Bro. Abr. tit. *Feoffment al Uses*, 40; Bac. on Uses, 347.

corporate capacity (*g*), although, in certain cases, it is liable to an indictment for allowing a bridge or a highway, the repair of which belongs to it by law, to fall into decay, and it can be sued for a libel (*h*). [Moreover, aggregate corporations which have a head,—*e.g.*, a dean and chapter, —cannot, during a vacancy of the headship, do any act, save to appoint a new head; nor can they, while without a head, accept a grant (*i*). But there may, of course, be a corporation aggregate without a head; *e.g.*, the collegiate church of Southwell in Nottinghamshire, which consists only of canons (*k*), and the governors of the Charter-house, London, who have no president or superior, but are all of equal authority. (6.) Another incident of corporations aggregate is, that the act of the major part is esteemed the act of the whole; for although, by the civil law, the major part must, at the least, have consisted of two-thirds of the whole (*l*), yet, with us, *any* majority is sufficient to determine the act of the whole body (*m*). (7.) It is also incident to corporations aggregate to have the power of electing their own members; and when this power is not specially assigned by the charter to a committee of the members, it belongs to the major part of the corporation duly assembled for the purpose, though it may, in general, be delegated to a select body or committee of the corporators (*n*). (8.) Corporations aggregate may take *goods and chattels* for the benefit of themselves and their suc-

(*g*) *Sterens* v. *Midland Rail Co.* (1854), 10 Exch. 352.

(*h*) *Whitfield* v. *The South-Eastern Rail. Co.* (1858), El. Bl. & El. 115; *Green* v. *The London Omnibus Co.* (1859), 7 C. B. (N.S.) 290. And (as to a *malicious prosecution*) see *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392.

(*i*) Co. Litt. 263, 264.

(*k*) The Ecclesiastical Commissioners Acts, 1840 (3 & 4 Vict. c. 113), ss. 18, 36, 41; 1841 (4 & 5 Vict. c. 39), s. 12; 1866 (29 & 30 Vict. c. 111), s. 21.

(*l*) Dig. 3, 4, 3.

(*m*) *Oldknow* v. *Wainwright* (1760), 2 Burr. 1017.

(*n*) *Rex* v. *Spencer* (1766), 3 Burr. 1828. (This power of delegation is, of course, strictly subject to the provisions of the charter or act of parliament regulating the constitution of the corporation.)

[cessors, just as natural persons may for themselves their executors and administrators; but a sole corporation cannot take goods in its corporate capacity, because such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and the executor (*o*).] So a lease for years granted to a bishop and his successors would go to the executors of the bishop (*p*). Yet if a sole corporation be the representative of a number of persons, *e.g.*, the master of a hospital, or the dean of some antient cathedral, it may take goods in its corporate capacity equally as a corporation aggregate may do; and a bond to the master or dean, and his successors, is good in law (*q*). A corporation was formerly incapable of holding property as a joint tenant; and a limitation of an estate to a corporation and one individual or to two corporations, without words of severance, made them tenants-in-common. But this disability has recently been removed by statute (*r*).

Corporations, whether aggregate or sole, may purchase and hold land and real property to them and their successors, as natural persons may hold to them and their heirs (*s*); but their power of holding it is restricted by the provisions of the statutes of mortmain (*t*). It is said, however, that a corporation cannot hold land by copy of court roll (*u*).

These incidents of bodies corporate do not attach to bodies unincorporate. Thus, the inhabitants of a particular parish are not capable of holding lands to them and their successors, though they are capable of receiving a general

(*o*) Co. Litt. 46; *Power* v. *Banks*, [1901] 2 Ch. 487.

(*p*) *Ibid.*

(*q*) Dyer, 48; *Byrd* v. *Wilford* (1593), Cro. Eliz. 464.

(*r*) Bodies Corporate (Joint Tenancy) Act, 1899.

(*s*) *The Case of Sutton's Hospital* (1613), 10 Rep. 30.

(*t*) See 15 Ric. 2, c. 5, and for later legislation the Mortmain and Charitable Uses Acts, 1888 and 1891. *Vide sup.* vol. I., pp. 316, 331.

(*u*) *Att.-Gen.* v. *Lewin* (1837), C. P. Cooper, 54.

grant of incorporation, which would enable them to hold such an inheritance (*x*); and many parishes held land before the passing of the Local Government Act, 1894, though they could not *show* any incorporation of the parishioners (*y*). And though a voluntary society of individuals should unite together by mutual agreement for common purposes, should provide a common stock by subscription, and should subject themselves to laws of their own creation for the government of their society, yet all this will not entitle them to the privilege of suing or being sued in their corporate capacity, or protect them from individual liability (*z*). Indeed, for any persons to assume to themselves the character of a corporation, and to attempt to act and to hold themselves out as such without a charter, is in the nature of a criminal offence at the common law, being an invasion of the royal prerogative (*a*).

III. [We are next to inquire, how corporations may be *visited*. For corporations, being composed of individuals who are subject to human frailties, are themselves likewise so subject. And for that reason the law has provided proper persons to visit them, inquire into their habits, to correct irregularities of conduct, and the like.

(1.) As regards *ecclesiastical* corporations, the ordinary is their visitor. For as the pope formerly, and now the Crown, as supreme ordinary, is the visitor of the archbishop or metropolitan, so the metropolitan has the charge and coercion of all his bishops, and the bishops are, within their several dioceses, the visitors of all deans

(*x*) *Ashby* v. *White* (1701), Lord Raym. 951; S. C., 3 Salk. 18; 12 Rep. 121.

(*y*) *Att.-Gen.* v. *Webster* (1875), L. R. 20 Eq. 483; *Ex parte Vaughan* (1866), L. R. 2 Q. B. 114; *In re Campden Charities* (1881), 18 Ch. D. 310. See later for parish meetings and parish councils.

(*z*) *Todd* v. *Emly* (1841), 8 M. & W. 505.

(*a*) *Durergier* v. *Fellows* (1828), 5 Bing. 248.

[and chapters, of all rectors and vicars, and of all other spiritual corporations (*b*).] (2.) But as regards *lay* corporations,—First, of those of the *eleemosynary* kind, the founder and his heirs or assigns are the visitors, for in a lay incorporation the ordinary cannot visit (*c*); and if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it, for here the royal prerogative prevails. The founder has also a right to appoint a visitor, and to limit the jurisdiction that he is to possess; and if the heirs of a private founder fail, and no visitor has been appointed by him, the right of visitation devolves, in such case, upon the Crown, and is exercised on behalf of the Crown by the Lord Chancellor, sitting as the representative of the king (*d*). But, secondly, if the lay corporation be of the *civil* kind, it has no visitor; for the misbehaviours of all civil corporations are inquired into and redressed, and their controversies decided, in the King's Bench Division (*e*).

[As regards *hospitals*, if the hospital be spiritual, the bishop shall visit, but if lay, the patron (*f*). The right of lay patrons was, however, abridged by the 2 Hen. V. (1414), st. 1, c. 1, which ordained that the ordinary should visit *all* hospitals founded by subjects, though the king's right was reserved to visit (by his commissioners) such as were of royal foundation: and although the subject's right was in part restored by the 14 Eliz. (1572), c. 14, which directs the bishops to visit such hospitals only where no visitor is appointed by the founders thereof, and all the hospitals founded by virtue of the statute 39 Eliz. (1597), c. 5 are to be visited by such persons as shall be nominated by

(*b*) *Re Dean of York* (1841), 2 Q. B. 1; *R.* v. *Dean of Rochester* (1851), 17 Q. B. 1.

(*c*) 1 Bl. Com. p. 480.

(*d*) *R.* v. *Catherine's Hall* (1791), 4 T. R. 233; *Ex parte Wrangham* (1795), 2 Ves. jun. 609.

(*e*) *Phillips* v. *Bury* (1694), Lord Raym. 8.

(*f*) Year Book, 8 Edw. 3, 28; 8 Ass. 29.

[the respective founders, still, if the founder appoints nobody, the bishop of the diocese must visit (*g*).

Colleges, as distinguished from *Universities*, are eleemosynary corporations; but the right of visitation was antiently claimed (and, in a sense, usurped) by the ordinary of the diocese. And in some of the colleges of Oxford, where no special visitor was appointed, the Bishop of Lincoln (in whose diocese Oxford was formerly comprised) has immemorially exercised visitatorial authority, which can be ascribed to nothing else but his supposed title as ordinary (*h*).] But it is now well established law, that colleges are *lay* corporations, though sometimes totally composed of ecclesiastical persons (*i*); and that, where the founder has appointed no other visitor, and his heirs become extinct, the right of visitation belongs to the Crown, being exercised by the Lord Chancellor, as the Crown's representative.

The duties of the visitor are, generally, to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes (*k*): and, in the exercise of these duties, he is to be guided by the intentions of the founder, so far as they can be collected from the statutes or from the design of the institution. But otherwise, and as regards the course of proceeding, he is restrained to no particular forms (*l*): and while he keeps within his jurisdiction, his determinations as visitor are final, and examinable in no other court whatsoever (*m*).

IV. [We come now to consider, how corporations may be dissolved, this question possessing very considerable

(*g*) 2 Inst. 725.

(*h*) 1 Bl. Com. 483.

(*i*) *Phillips* v. *Bury* (1694), Lord Raym. 8.

(*k*) *Dr. Lee's Case* (1858), El. Bl. & El. 863.

(*l*) *Re Dean of York* (1841), 2 Q. B. 1.

(*m*) *R.* v. *Bishop of Worcester* (1815), 4 M. & S. 415.

importance, because the dissolution is the civil death of the corporation, and the corporate lands and tenements thereupon revert to the person (or his heirs) who granted them to the corporation. For the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have again the lands, because the cause of the grant faileth (*n*) ; and further, the debts of a corporation aggregate (either to or from it) are totally extinguished by its dissolution (*o*).

Now, a corporation may be dissolved in various ways :— (1.) By the loss of such an integral part of its members as is necessary, according to its charter, to the validity of the corporate elections ; for in such cases, the corporation has lost the power of continuing its own succession, and will accordingly be dissolved by the natural death of all its members (*p*), unless indeed its resurrection is otherwise provided for by statute. (2.) By surrender of its franchises into the hands of the king, which is a kind of suicide. (3.) By forfeiture of its charter, through negligence or abuse of its franchises, in which case, the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void (*q*) ; and the regular course, in such case, is to bring an information, in the nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law for the purposes of the state, in the reigns of King Charles the Second and King James the Second, particularly by revoking the charter of the city of London, gave great and just offence ; and the judgment against the validity of the charter of London was reversed by Act of

(*n*) Co. Litt. 13.

(*o*) *In re Higginson and Dean*, [1899] 1 Q. B. 325.

(*p*) *R.* v. *Morris* (1803), 3 East, 213 ; S. C., 4 East, 17.

(*q*) *R.* v. *Ponsonby* (1755), 1 Ves. jun. 8 ; *Eastern Archipelago Co.* v. *The Queen* (1853), 2 El. & Bl. 856.

[Parliament after the Revolution, and the franchises of the city of London (it was thereby declared) should never more be forfeited for any cause whatever (*r*).] It is also especially to be noted, that even a company, such as a parliamentary or chartered company, not registered under the Companies Acts (to be explained in the next chapter) may be *wound up* by the court under the provisions of those Acts, and of the Companies (Winding Up) Act, 1890 (*s*). But the provisions of the latter Act only apply to companies whose registered offices are in England or Wales (*t*).

(*r*) 2 W. & M. (1690), c. 8; *R.* v. *Amery* (1788), 2 T. R. 515; 4 T. R. 122.

(*s*) Companies Act, 1862, ss. 199—204.

(*t*) Companies (Winding Up) Act, 1890, s. 31 (3).

CHAPTER II.

OF LIMITED COMPANIES.

To remedy inconveniences, which seriously hampered commerce, Parliament has in modern times interposed divers provisions and expedients. For, first, by the Chartered Companies Act, 1837 (amended by the Chartered Companies Act, 1884), her Majesty was empowered, by *letters-patent*, to grant to any company or body of persons, associated for any trading or other purposes whatever, any privileges which (according to the common law) it would have been competent to the Crown to grant to any such company by charter of incorporation, and this, without incorporating such persons. Secondly, there were divers Acts passed for the formation of *Joint Stock Companies*. Lastly, above all, there have been passed the Companies Acts, 1862 to 1900 (*a*), in which most of the existing provisions on this subject will be found (*b*).

(*a*) The last named being 63 & 64 Vict. c. 48.

(*b*) Some few of their provisions have been amended in certain particulars by 33 & 34 Vict. (1870) c. 104; 40 & 41 Vict. (1877) c. 26; 42 & 43 Vict. (1879) c. 76; 43 Vict. (1880) c. 19; 53 & 54 Vict. (1890) c. 64; 56 & 57 Vict. (1893) c. 58; and 61 & 62 Vict. (1898) c. 26. See also 46 & 47 Vict. (1883) c. 30, (providing for English companies establishing branch registers in the colonies); 49 & 50 Vict. (1886) c. 23 (containing certain provisions applicable to the winding up of companies whose registered office is in Scotland); and 51 & 52 Vict. (1888) c. 62, and 60 & 61 Vict. (1897) c. 19 (and, as to companies within the Stannaries, 50 & 51 Vict. (1887) c. 43), providing for the payment of wages and salaries in priority upon a winding up. These last-mentioned provisions are in lieu of the like provisions contained in the repealed Act 46 & 47 Vict. (1883) c. 28.

Under the Companies Acts, 1862 to 1900, any *seven* or more persons associated for any lawful purpose, may, by subscribing their names to a *Memorandum of Association* (*c*), and by otherwise complying with the requisitions of the Acts in respect of registration, form themselves into an incorporated company, with or without limited liability. The Memorandum of Association *may*, in the case of a company "limited by shares," and *must*, in the case of a company "limited by guarantee," or "unlimited," be accompanied by *Articles of Association*, signed by the subscribers to the Memorandum of Association, and prescribing such regulations for the conduct of the company as they may deem expedient (*d*). And no company or association, consisting of more than twenty persons, can be formed for the purpose of carrying on any business that has for its object the acquisition of gain to the association or to the individual members thereof, unless it is registered under the Acts (*e*); this provision not extending to any company or association formed in pursuance of some other Act or of letters-patent, nor to any mining company within and subject to the jurisdiction of the Stannaries.

Upon due registration, the Registrar of Joint Stock Companies, an officer appointed by and acting under the superintendence of the Board of Trade (*f*), is to certify, under his hand, that the company is incorporated; and in the case of a "limited" company, that it is "limited" (*g*).

(*c*) Act of 1862, s. 6.

(*d*) Sect. 14.

(*e*) Sect. 4; *Smith* v. *Anderson* (1880), 15 Ch. D. 247; *In re Siddall* (1885), 29 Ch D. 1. The maximum number, in the case of bankers, is *ten*.

(*f*) Act of 1862, s. 174.

(*g*) As the general rule, the word "limited" must be used by any company registering itself as one with limited liability. An exception, however, is made by Act of 1867, s. 23, in favour of any limited company formed to promote "commerce, art, science, religion, or any other useful object," and not for individual gain, and licensed by the Board of Trade to be registered without the addition of the word "limited" to its name.

Thereupon the members become a body corporate, by the name contained in the Memorandum of Association, and capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands (*h*); and with power also for each member to transfer his interest without the consent of the rest (*i*). The certificate of incorporation given by the registrar is conclusive evidence, that all the requisitions as to registration have been duly complied with, and that the company is a company duly registered under the Companies Acts (*k*).

A company which has been incorporated in this manner is managed by a body of directors appointed by the members; and the capital or joint stock of the company is the measure of its corporate liability. The appointment and qualification of directors are specially provided for: and by the Act of 1900, additional precautions have been taken to safeguard the public against incompetent and fraudulent promoters of companies (*l*). And here we will observe, that the amount of such capital is to be specified in the original Memorandum of Association of the company; but by the Acts of 1867 and 1877, a limited company may, under certain restrictions, (1) *reduce its capital*, or cancel any capital which shall have been lost, or which shall consist of unissued shares; and may also (2) *divide* its capital into shares of a smaller amount than was fixed by its original memorandum of association. By the Act of 1879, s. 3, an unlimited company, on registering as a

(*h*) Act of 1862, s. 18. But no company, formed for the purpose of promoting *art*, *science*, *religion*, *charity*, or any other like object (not involving the acquisition of gain by the company, or by the individual members thereof), may, without the written licence of the Board of Trade, hold more than two acres of land. (Sect. 21.)

(*i*) Act of 1862, ss. 22–24; Act of 1867, s. 26.

(*k*) Act of 1900, s. 1.

(*l*) Sects. 2 and 3. One of the most useful of these new safeguards is the provision, that a company shall not proceed to allotment unless a *minimum* subscription has been fixed and received.

limited company, may also increase its capital; and by the Act of 1880, a company may (out of its accumulated profits) return to the members a portion of the paid-up capital, correspondingly increasing, in such case, the amount of its unpaid capital.

The liability of the individual members of the company is limited by the amount of the unpaid capital owned by them respectively; and as to such individual limited liability, the rule is (*m*), that, in the event of the company being wound up, every present and past member thereof shall, in proportion to his capital, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of its winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves. The liability to contribute may even attach to persons who have ceased, through having disposed of their shares, to be members of the company; but (1) No past member will be liable, if he has ceased to be a member for one year or upwards, prior to the commencement of the winding-up;—(2) No past member will be liable, in respect of any debt or liability of the company contracted after he ceased to be a member;—(3) No past member will be liable, unless it appears to the court before which the winding-up takes place, that the existing members are unable to satisfy the contributions required to be made by them;—and, (4) In the case of a company *limited by shares*, no contributions can be required from *any* member (past or present), exceeding the amount unpaid on the shares in respect of which he is liable as a present or past member.

It results, therefore, that in the case of a "limited" company (*n*), the members may be made liable to the

(*m*) Act of 1862, s. 38; and see ss. 7—10.

(*n*) The text refers only to companies "limited" *by shares*; but there may also be companies "limited *by guarantee*," in which

amount unpaid on the shares respectively held or once held by them, while, in the case of an "unlimited" company, the liability of each member thereof remains unlimited. But with reference to the liability of the *directors* as distinct from the ordinary members, it has been provided, by the Act of 1867, s. 4, that the Memorandum of Association of a "limited" company, either as originally framed or as subsequently altered by special resolution, may provide, that the liability of the directors, managers, or managing director thereof, shall be *unlimited*, in which case, each of the directors or managers will (subject to certain restrictions specified in the Act) (*o*) be liable to contribute, in the event of a winding-up, as if he were a member of an unlimited company. And with regard to banking companies which have a note-issue, it has been provided, by the Act of 1879, s. 6, that, though they register with "limited" liability, the members shall, *to the extent of the note-issue*, remain liable as ordinary partners would be; that is to an unlimited extent.

The objects for which the company is established must be carefully stated in the original Memorandum of Association; otherwise, great difficulties may arise with regard to the power of the company to engage in various undertakings (*p*). Generally speaking, the company is strictly bound by its Memorandum of Association; but, by the Companies Act, 1890, the company may, by special resolution and with the sanction of the court, modify its objects in certain particulars, calculated for the more advantageous conduct of the business of the company, or for its more convenient and economical management (sects. 1, 2). And the provisions with regard to the Memorandum and Articles of Association have been modified by the Companies Act, 1900.

latter case, the liability of each member is co-extensive with the amount he has undertaken to contribute (Act of 1862, ss. 9, 38).

(*o*) Sects. 5, 8.

(*p*) As regards the doctrine of *ultra vires* generally, see *Ashbury Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653.

As regards the winding-up of a company thus established, any person to whom the company is indebted in a sum exceeding £50, then due, and who has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the debt, may, if he obtains no satisfaction within three weeks, take proceedings to have the company wound up (*q*) ; and such a course may also be taken by any creditor, if execution, issued on a judgment against the company obtained in his favour, is returned unsatisfied (*r*). The application for the winding-up order, that is to say, for a *compulsory* winding-up by the court, is to be made by petition in the Chancery Division, or, in certain cases, in the County Court (*s*) ; and the winding-up is deemed, in general, to commence with the presentation of the petition. Immediately on the winding-up order being made, the official receiver becomes the provisional liquidator of the company (*t*) ; and he may become or continue the permanent liquidator, *i.e.*, the person to whom the realisation and distribution of the assets of the company are entrusted. But the court may appoint some third party to be the liquidator, who is required to be a man of integrity and special aptitude, being formerly called the *official liquidator* (*u*). The liquidator takes into his custody all the property, effects, and things in action of the company, and deals with them by sale or otherwise as the court shall sanction ; and generally does all such other things as may be necessary for winding up the affairs of the company and for distributing its assets (*x*). And the court, in due course, proceeds to settle a list of *contributories*, or persons liable as members to contribute to the assets of the company (*y*), and to make *calls* on all or any of the contributories, to the extent of their liability,

(*q*) Act of 1862, ss. 79, 80.
(*r*) *Ibid.*
(*s*) Sects. 81, 82 ; Companies (Winding up) Act, 1890, s. 1.
(*t*) *Ibid.* s. 4 ; Act of 1862, s. 41.
(*u*) Act of 1862, s. 92.
(*x*) Sects. 94, 95.
(*y*) Sects. 38, 74, 98.

for payment of the sums necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves (*z*). As soon as the affairs of the company have been completely wound up, the court makes an order that the company be dissolved (*a*).

To this general view of the subject of winding-up, the details of which are now largely regulated by the Companies (Winding-up) Act, 1890 (*b*), it must be added, that, whenever a company is unable to pay its debts (and in some other cases also), a petition for winding-up may be presented by the company itself, or by a contributory or contributories, as well as by a creditor or creditors, or by all or any of such parties in conjunction (*c*). But, as regards the right of a contributory to present the petition, it is provided, by the Companies Act, 1867, s. 40, that such right shall be restricted to cases in which the members of the company have become less in number than seven, or in which such contributory is an original allottee, or else has held his shares for a certain period, or has become entitled to the shares through the death of a former holder.

There may also be a *voluntary* winding-up ; and that is, where the company passes the prescribed resolution (*d*) for the purpose (*e*). The effect of this resolution is, that a liquidator is appointed by the company itself : and the liquidator so appointed settles a list of the contributories, makes calls, and exercises all the powers given to the liquidator in a winding-up by the court (*f*). A voluntary winding-up is deemed to commence at the time of passing the prescribed resolution (*g*).

The court also may, in lieu of making an order for the

(*z*) Sect. 102.
(*a*) Sect. 111.
(*b*) 53 & 54 Vict. c. 63.
(*c*) Act of 1862, ss. 79—82.
(*d*) Act of 1862, s. 51.
(*e*) Sect. 129.
(*f*) Sect. 123.
(*g*) Sect. 130.

compulsory winding-up of the company by the court, order that it be wound up *under the supervision of the court;* and such order is called a "supervision order." But a compulsory order is, in general, preferable, for many reasons, and more especially where matters affecting the directors and officers of the company require to be investigated. Such investigation used to take place under sect. 165 of the Companies Act, 1862, but it is now regulated, as to English Companies, by sect. 10 of the Companies (Winding-up) Act, 1890; or, when proceedings are to be taken against promoters and others, on the ground of any alleged fraud contained in any prospectus or notice, either under the Companies Act, 1867, s. 38 (*h*), or under the Directors' Liability Act, 1890.

(*h*) Repealed by Companies Act, 1900, s. 33. But see *Broome* v. *Speak*, [1903] 1 Ch. 586, as to the effect of the repealing Act on a right of action which had accrued under the repealed section.

CHAPTER III.

OF MUNICIPAL CORPORATIONS, COUNTY COUNCILS, DISTRICT COUNCILS, AND PARISH COUNCILS.

I. Municipal Corporation.

A *municipal corporation* was anciently a body politic and corporate, established in a town to promote and protect the interests of the inhabitants. Its origin is lost in history; but it would appear, that, even prior to the Norman Conquest, there existed the germ of municipal corporations in this country, it having been frequent for such persons of free condition as were not landowners to settle in the towns, under the name of burgesses, and to occupy houses there, as tenants to the Crown or to some inferior lord, and to form themselves into voluntary associations or fraternities, called *gilds* or *guilds*. In their capacity of burgesses, they were often entitled to certain property, subject to certain burdens, and exempt from certain liabilities. Soon after the Conquest, and from thence downwards to the time of Henry the Sixth, or thereabouts, charters were from time to time conceded, by the Anglo-Norman kings, to the same towns, and to others, either confirming the former grants, or conferring new grants (*a*); and by such charters, the boroughs were frequently demised in fee farm to the burgesses (*b*), *i.e.*, the boroughs were quit of all render to the Crown or other lords, on condition of paying an annual "farm" or fixed rent. It was usually an object of ambition with

(*a*) Ellis, *Introduction to Domesday*, vol. 1, 191.

(*b*) Madox, *Firma Burgi*, p. 37.

these burgesses to have a *guild-merchant*, and officers,—such as mayors, aldermen, bailiffs, and the like,—for the government of their towns, and to hold courts of their own, for the administration of justice within their town precincts (*c*). They frequently enjoyed also other liberties and privileges, being exempted from arbitrary taxation and from feudal oppressions. From about the reign of Henry the Sixth onwards, the charters granted by our different monarchs usually contained express words of incorporation, as that the mayor, etc., and burgesses of the particular town, should be "a body corporate" by the specified name, and by that name should have perpetual succession, and be competent to sue and be sued, and the like (*d*). Municipal charters, however, came to be granted less and less for the purposes of local government, and more and more with a view to strengthening the influence of the Crown in Parliament. Owing to defects in the original grant, or to abuses which grew up by custom, municipal life fell into decay. Revenues were misspent by "close" bodies free from popular control; and the connection of municipal with magisterial offices in many boroughs tainted the administration of justice. There was, almost necessarily, a very great want of uniformity among the municipalities thus successively created. A royal commission was therefore appointed in the year 1834 "to inquire into the existing state of municipal corporations in England and Wales, and to collect information respecting the defects in their constitution, etc." Acting upon the recommendations contained in the report of the commission, Parliament, in the following year, passed an Act "to regulate the municipal corporations in England and Wales" (5 & 6 Will. IV. c. 76), commonly called "The Municipal Corporations "Act, 1835." The main purpose of this great Act, which

(*c*) Madox, *Firma Burgi*, 28, 116, 136, 139.

(*d*) *Ibid.* 28.

is the foundation of our modern system of local government, was to separate administration from justice, and to hand over the former to a representative council elected by the whole body of burgesses. Many of the incorporated boroughs were mere villages. These were excluded from the Act. The remainder, 178 in number, received charters, and were deprived of those peculiarities which conflicted with the provisions of the new code. It must not be forgotten, however, that many municipal corporations enjoy special and additional powers under local Acts, which are from time to time passed to satisfy a local demand which cannot be met by the provisions of general Acts.

The Municipal Corporations Act, 1835, continued to regulate these institutions, having been in the meantime successively amended by further Acts (*e*), until the year 1882, when the Act of 1835, and the amending Acts, were repealed, and their provisions consolidated (with further amendments) in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). By this last-mentioned Act, all corporate towns are placed under one constitution and plan of administration, the key-note or governing principle of which is, that the municipalities shall manage their own affairs in accordance with the law, by municipal councils of their own election (*f*).

For this purpose, the Act proceeds, first, to define who shall be the burgesses, *i.e.*, the electors of the municipal

(*e*) The prior Municipal Corporation Acts are enumerated in the schedule to the Municipal Corporations (New Charter) Act, 1877 (40 & 41 Vict. c. 69), and also in the schedules to the Municipal Corporations Act, 1882.

(*f*) Since 1882 many statutes have been passed conferring additional powers on municipal and other local bodies; but with the exception of the Local Government Act of 1888, scarcely any change has been made in the law of municipal constitutions. The metropolitan boroughs created by the London Government Act of 1899 (62 & 63 Vict. c. 14), do not come within the provisions of the Municipal Corporations Act of 1882.

council; and by sect. 9, a *burgess* is defined as a person of full age, not an alien, nor having received within the preceding twelve months parochial relief or other alms (*g*), who on the fifteenth day of July in any year shall have occupied any house, warehouse, counting-house, shop, or other building within the borough during the whole of the preceding twelve months; and during such occupation, shall have resided within the borough, or within seven miles thereof, and shall, during such time, have been rated, in respect of such premises, to all rates for the relief of the poor, and have paid (on or before the 20th of July in such year) all such poor and borough rates, in respect of the same premises, as shall have been payable up to the preceding 5th of January. Every such person duly qualified is entitled to be enrolled as a burgess on the *burgess roll* (*h*); but when the qualifying premises come to the party by descent, marriage, marriage settlement, devise, or promotion to any benefice or office, the occupancy and rating of the predecessor may be reckoned as part of the twelve months (*i*). To the qualifications prescribed by the Municipal Corporations Act, 1882, sect. 9, the ten pounds occupation qualification, under the Registration Act, 1885, has now been added by the County Electors Act, 1888 (*k*).

The Act also provides, that in every borough there shall be elected annually by the council a "mayor" (*l*), and

(*g*) The receipt of medical or surgical assistance from any municipal charity, or treatment in a hospital is not a disqualification; nor is the education of the burgess's child in any public or endowed school. (45 & 46 Vict. c. 50 (1882), s. 33.)

(*h*) As to the burgess roll and voting papers see the Act of 1882, s. 45; *Ex parte Hindmarch* (1867), L. R. 3 Q. B. 12; *R.* v. *Tugwell* (1868) *ib.* 704.

(*i*) Act of 1882, s. 33; and (as to female burgesses) s. 63, following 32 & 33 Vict. (1869), c. 55, s. 9; *R.* v. *Harrald* (1872), L. R. 7 Q. B. 361.

(*k*) 51 & 52 Vict. (1888), c. 10, s. 3.

(*l*) Act of 1882, s. 61. By ss. 16 and 67, provision is made (following 16 & 17 Vict. (1853), c. 79, ss. 7, 8) for the death, illness, absence or incapacity of the mayor or other municipal officer.

periodically a certain number of "aldermen," and by the burgesses a certain number of "councillors" (*m*), all of whom together shall constitute "the council" of the borough (*n*), and shall be respectively chosen from among persons enrolled and entitled to be enrolled as burgesses (*o*), and otherwise qualified as in the Act described (*p*). The election of councillors is conducted in the same manner as under the Ballot Act, 1872 (35 & 36 Vict. c. 33), and is subject to like provisions with regard to corrupt and illegal practices, but with certain modifications, as those to which parliamentary elections are subject. In the case of the larger boroughs, divided into wards, the election of the councillors for the different wards is made by the burgesses of the respective wards (*q*). The aldermen are to be elected by the council (*r*); their term of office is for six years. They are one-third of the number of councillors, and half of them retire every three years. The council must meet once a quarter, and oftener if due notice be given, for the transaction of the general business of the borough (*s*). A majority of the members present (if those present amount to one third of the whole) may decide every question. The mayor, or the member presiding in his absence, has a casting vote (*t*). At any meeting, the council may make by-laws, for the good rule and government of the borough, and for the prevention and suppression of nuisances; and offences against such by-laws may be

(*m*) Act of 1882, s. 10.

(*n*) *Ibid.*

(*o*) Sect. 11. The Parliamentary Registration Acts (as to which *vide sup.* vol. II. pp. 391—394), apply also *mutatis mutandis*, to the making out and revision of the burgess list (see 41 & 42 Vict. (1878), c. 26, ss. 15, 18; Act of 1882, ss. 44, 45; and 54 & 55 Vict. (1891), c. 68, ss. 2, 3).

(*p*) Act of 1882, ss. 11, 12. No person may be a councillor or alderman if he holds any place of profit under the council, or is a clergyman, or has a direct or indirect interest in any contract or employment with or under the council.

(*q*) Act of 1882, s. 30; *R.* v. *Parkinson* (1867), L. R. 3 Q. B. 11.

(*r*) Act of 1882, ss. 14, 15.

(*s*) *Ibid.* s. 22, and 2nd schedule to Act.

(*t*) *Ibid.*

punished by fines not exceeding five pounds (*u*). Such by-laws under the Municipal Corporations Act may be disallowed by Order in Council. By-laws passed by a council under the Public Health Acts are subject to the approval of the Local Government Board. And any by-law may be invalidated as unreasonable or contrary to law by a court of justice. It is also required that the burgesses shall annually elect (*x*), from among those qualified to be councillors, two auditors and two assessors, the former to audit the accounts of the borough, the latter to assist in revising the burgess list; and there is also to be a third auditor, appointed by the mayor, and called the mayor's auditor (*y*). The council also appoint a town clerk, and a treasurer (neither of whom may be a member of the council), and such other officers as have been usual or as are necessary, with power also to fix their salaries (*z*). If the borough has a separate court of quarter sessions, the council must appoint a clerk of the peace (*a*), and also a coroner (*b*), except in quarter sessions boroughs having a population of less than 10,000 in 1881, when the power of appointment of coroner is transferred to the county council (*c*).

If a borough desires to have a separate court of quarter sessions, the Municipal Corporations Act, 1882, provides, that the council of any such borough may petition the Crown for that purpose (*d*); and if the application be granted, the Crown will appoint a barrister at law to be recorder of the borough, and he will not only be sole judge of such court of quarter sessions, but also of the borough court of record for civil actions, if there be any, provided that such court of record be not regulated by

(*u*) Act of 1882, s. 23.
(*x*) *Ibid.* s. 25,
(*y*) *Ibid.* ss. 25, 29, 62.
(*z*) *Ibid.* ss. 17, 18, 19.
(*a*) *Ibid.* s. 164.
(*b*) *Ibid.* s. 171.
(*c*) Local Government Act, 1888, s. 38. As to county boroughs not being quarter sessions boroughs, see the same Act, s. 34.
(*d*) Act of 1882, s. 162.

any Act of Parliament (*e*). If the council desire it, a stipendiary magistrate or magistrates may also be appointed for the borough (*f*). Moreover, to boroughs having a separate court of quarter sessions, the Crown is empowered to grant a commission of the peace (*g*), and to nominate such persons to be justices within the borough as it shall think proper (*h*); and among such justices, the mayor (during his mayoralty), and also the recorder, are included by virtue of their offices (*i*). Such a borough, if previously exempt from the jurisdiction of the county justices by reason of a *non-intromittant* clause in its charter (*k*), will continue to be so exempt. But otherwise the county justices have *concurrent* jurisdiction (*l*); and, of course, where the borough has no separate quarter sessions, the county justices have jurisdiction within the borough.

Under the Act of 1882, the old theory that a corporation may not acquire land except by license in mortmain from the Crown is so far preserved, that a municipal corporation may not purchase and hold more than five acres of land without a license or an Act of Parliament.

It is provided also, that the council shall not, except with the approval, formerly of the Lords of the Treasury, but now of the Local Government Board (*m*), sell or mortgage the lands or public stock of the borough, or demise such lands for more than a certain term (*n*). The rents, profits, and interest of all corporate property are to be paid to the treasurer, and carried to the account

(*e*) As to the borough courts of record, see Act of 1882, ss. 165, 175.

(*f*) *Ibid.* s. 161.

(*g*) *Ibid.* s. 156.

(*h*) As to the borough justices, see also 12 & 13 Vict. (1849), cc. 8, 18, 64; 13 & 14 Vict. (1850), c. 91; Justices Jurisdiction Act, 1852 (15 & 16 Vict. c. 38); Criminal Justice Act, 1855 (18 & 19 Vict. c. 126); and as to their *clerk*, see also 51 & 52 Vict. (1888), c. 23.

(*i*) Act of 1882, s. 155 (mayor); s. 63 (recorder); and 51 & 52 Vict. (1888), c. 23.

(*k*) *R.* v. *Sainsbury* (1791), 4 T. R. 451.

(*l*) 2 Arch. *Just*, 7th ed., 1109.

(*m*) Local Government Act, 1888, s. 72.

(*n*) Act of 1882, s. 108.

of the *borough fund* (*o*), which fund, after discharging debts (*p*), is to be applied in or towards the payment of salaries, the expenses connected with the corporate elections, prosecutions, constabulary, prison accommodation, and other public purposes (*q*), the surplus (if any) being expended for the public benefit of the inhabitants (*r*), and the deficiency (if any) being made up by a rate (*s*). The borough accounts are to be, at all times, open to inspection, and also regularly audited by the borough auditors, and printed for the use of the ratepayers (*t*), and submitted to the Secretary of State, and by him laid before Parliament (*u*).

The Municipal Corporations Act, 1835, thus superseded by the Consolidation Act of 1882, distinguished between the rights newly conferred, and the antecedent rights of the corporators, both with regard to the corporate property, and with regard also to the parliamentary franchise. And, First, as to the corporate property, it provided, that every inhabitant, and every person admitted a freeman or burgess, and the wife, widow, son, or daughter of any freeman or burgess, and every person married to the daughter or widow of a freeman or burgess, and every apprentice, should respectively enjoy the same share and benefit of the lands and public stock of the borough, as he or she might have enjoyed in case the Act had not been passed, subject only to this limitation, namely, that the total amount to be divided among such persons should not exceed the surplus which remained after payment of the expenses charged by the Act upon the borough fund (*x*). And, Second, as to the parliamentary franchise, the Act

(*o*) Act of 1882, s. 139.

(*p*) *Ibid.* ss. 112, 113.

(*q*) *Ibid.* s. 140, and 5th schedule to Act.

(*r*) *Ibid.* s. 115.

(*s*) *Ibid.* s. 144.

(*t*) *Ibid.* ss. 26, 27. The only portion of borough accounts audited by the Local Government Board are the education accounts under the Education Act of 1902.

(*u*) *Ibid.* s. 28.

(*x*) Act of 1835, s. 2.

provided, that every person who would or might, as a burgess or freeman, have had the right of voting in the election of members of parliament if the Act had not passed, should continue to be entitled to that right (*y*). For the purposes of such reserved rights, the Act required the town clerk of every borough to make out a list, to be called *the freemen's roll*, of all persons admitted burgesses or freemen (*z*), as distinguished from the burgesses newly created by the Act, and who were to be entered on another roll, to be called the *burgess roll*. And the Municipal Corporations Act, 1882, has enacted that the *freemen's roll* shall still be kept (*a*); and that the property rights of such freemen (*b*), and also their parliamentary franchises (*c*), shall be preserved.

Prior to the passing of the Municipal Corporations Act, 1835, the title of burgess (or the freedom of the city, as it was called), was generally acquired by birth, marriage, servitude, or by gift or purchase. But the Act provided, that no person should in future be made a burgess or freeman by gift or purchase (*d*); and although by the Honorary Freedom of Boroughs Act, 1885 (48 & 49 Vict. c. 29), the council may confer the freedom of the borough upon distinguished persons, yet this distinction is not to entitle such freemen to vote at any parliamentary or other election for the borough, or to participate in the corporate property of the borough. The Act of 1835 also abolished the exemptions that had theretofore been ordinarily claimed by burgesses, inhabitants, or the like, from such tolls or dues as were levied to the use of the body corporate (*e*). And whereas, before the Act, in divers boroughs, a custom had prevailed, and by-laws had been made, to the effect that no person not being free of the borough, or of certain

(*y*) Act of 1835, s. 4; 7 Will. 4 & 1 Vict. (1837) c. 78, s. 27.
(*z*) Act of 1835, s. 5.
(*a*) Act of 1882, s. 203.
(*b*) *Ibid.* ss. 205—208.
(*c*) *Ibid.* s. 209.
(*d*) Act of 1835, s. 3.
(*e*) *Ibid.* s. 2; 6 & 7 Will. 4 (1836), c. 104, s. 9.

guilds, mysteries, or trading companies therein, should keep a shop for merchandise, or use certain trades or occupations for gain within the same, the Act provided, that every person might in future keep any shop in the borough, and use every lawful trade and occupation therein, any such custom or by-laws notwithstanding (*f*). These wholesome provisions (it need hardly be mentioned) are maintained by the Municipal Corporations Act, 1882, which consolidates the previous statutes upon the subject.

By the London Government Act of 1899 (62 & 63 Vict. c. 14), twenty-eight metropolitan boroughs have been created in substitution for the old vestries, boards, commissioners, etc. The general administrative powers of these boroughs are but little larger than those of the vestries which they have superseded, and are derived mainly from the Metropolis Management Acts, the Public Health (London) Act, 1891, and the Housing of the Working Classes Act, 1890. The council of a metropolitan borough consists of a mayor, aldermen, and councillors, for which offices no woman is eligible. The number of aldermen is one-sixth the number of councillors. Aldermen are elected by the councillors for six years, half of them going out of office every three years. The number of councillors may not exceed sixty.

II. County Councils.

The principle of self-government which (as we have seen) is at the root of the municipal corporation, was extended from the borough to the county, by the Local Government Act, 1888 (51 & 52 Vict. c. 41) ; and at the same time the separation (already effected in boroughs) between justice and administration, was carried out in county government. Further, in order to work out more effectually the system which the Act has established, some material changes have been made in the law of municipal

(*f*) Act of 1835, s. 14.

corporations, and the larger boroughs have been raised to the condition of "county boroughs."

The Act of 1888 has established a representative council (called the county council) in every administrative county, and has entrusted to this new body a number of important functions (sect. 1). Thus, the Act has transferred to the county council all the administrative business of the justices of the county in quarter sessions assembled, in respect of all the matters enumerated in section 3, to which we shall revert later (*g*). The Act has also transferred to county councils the business of the justices of the county out of session, in respect of the licensing of stage plays, and the execution of the provisions of the Explosives Act, 1875 (sect. 7), but not any judicial business of the quarter sessions, or of the justices of the county as regards rating appeals, or, in fact, any judicial business whatever (sects. 8, 78). With regard to the county police, a compromise was adopted, and they have been placed under the joint control of the quarter sessions and the county council, such joint control being exercised through a standing joint committee (sect. 9).

The county council, as we have said, is a representative body, and its constitution resembles, though it is not identical with, that of a municipal corporation. A county council election is conducted, in general, as in the case of the election of the council of a borough divided into wards; but the divisions of the county are called electoral divisions and not wards (sect. 2). In the case of boroughs returning one or more county councillors, the electors are the municipal burgesses enrolled in pursuance of the Municipal Corporations Act, 1882; in the other parts of the administrative county they are the persons registered as county electors under the County Electors Act, 1888 (*h*). The date of the elections is now regulated by the County Councils (Elections) Act, 1891, which provides

(*g*) P. 37.

(*h*) 51 & 52 Vict. c. 10, s. 7.

that they shall take place on the 8th day of March, or on some day between the 1st and 8th day of March, in every third year.

A county council consists of a chairman, aldermen, and councillors (*i*), the aldermen being called "county aldermen," and the councillors being called "county councillors." The council is a body corporate, by the name of the administrative county, with perpetual succession, a common seal, and power to hold lands without licence in mortmain (*k*); and the clerk of the peace for the county is made the clerk of the county council (*l*). The chairman is elected by the council, and the aldermen are elected by the councillors. The aldermen, half of whom retire every three years, are elected by the councillors in the same way as under the Municipal Corporations Act, 1882 (*m*). County councillors are elected simultaneously for a term of three years; they retire and a new election takes place (*n*), as we have seen, in March instead of November.

The Act is not wholly concerned with the constitution and functions of county councils. It also constitutes each of the boroughs named in the third schedule to the Act an administrative county of itself, these scheduled boroughs being such as had on the 1st June, 1888, a population of not less than 50,000. All such boroughs are distinguished as "county boroughs," and their municipal councils have the powers of ordinary county councils (*o*).

The Act constitutes the Metropolis an administrative county by the name of "the administrative county of

(*i*) Women are not qualified for election to a county council; but clerks in holy orders and other ministers of religion are eligible either as aldermen or as councillors So, also, are peers qualified by owning property in the county, and all persons registered as parliamentary voters in respect of the ownership of property within the county. (Sect. 2.)

(*k*) Local Government Act, 1888, s. 79. (It will be noticed that the *inhabitants* of a county are not incorporated like the burgesses of a borough.)

(*l*) Local Government Act, 1888, s. 83.

(*m*) *Ibid.* s. 75.

(*n*) *Ibid.* s. 2.

(*o*) *Ibid.* s. 31.

London" (*p*). The London County Council is the successor of the Metropolitan Board of Works, and its administrative relations to the London boroughs (created out of the vestries in 1899 by the London Government Act of that year) resemble those which exist between an ordinary county council and an urban district council or non-county borough. For all non-administrative purposes the Act constitutes also a "county of London," consisting of those parts of the counties of Middlesex, Surrey, and Kent, which fall within the area of the administrative county of London. But the county of the *city* of London, for all non-administrative purposes, continues a separate county (*q*). The county councillors for the administrative county of London are double the number of members of parliament returned for the Metropolis, each borough (or division of a borough) being made an electoral division of the administrative county; and the number of county aldermen is not to exceed one-sixth of the whole number of county councillors (*r*). All the powers, duties, and liabilities of the Metropolitan Board of Works are transferred to the county council of the administrative county of London (*s*). Among these is the power of borrowing (*t*): and the powers formerly possessed by the Board have been largely

(*p*) Act of 1888, s. 40.

(*q*) Other administrative counties are made or recognized by the Act. Thus the Isle of Wight is separated from Hampshire. The three ridings of Yorkshire, the three divisions of Lincolnshire, the two divisions of Sussex, the two divisions of Suffolk, the two divisions of the county of Cambridge, and the two divisions of the county of Northampton are each made a separate administrative county; and (under the Yorkshire Coroners Act, 1897), the three ridings of Yorkshire are specifically made separate counties for all the purposes of the Coroners Acts, 1844 to 1892. Lastly, the Scilly Isles are managed by a local council of their own, under s. 49 of the Act of 1888.

(*r*) Act of 1888, s. 40 (5).

(*s*) *Ibid.* s. 40 (8) (9).

(*t*) See the Metropolitan Board of Works (Loans) Acts, 1869 to 1871, and the Metropolitan Board of Works (Money) Acts, 1875 to 1888.

increased for the better execution of the onerous duties entrusted to the London County Council (*u*).

The financial and administrative business of every county council includes (*x*) (among other less important matters) the making, assessing, and levying of county rates, police rates, and rates generally, and the application and expenditure of the money received on account of such rates, and from imperial grants in aid for certain local purposes; the borrowing of money and the passing of the accounts of the county treasurer; the control of elementary and higher education under the Education Act of 1902 (*y*); the provision, enlargement, maintenance, management, and visitation of pauper lunatic asylums, and of reformatory and industrial schools; the payment of compensation, payable formerly by the hundred or by the inhabitants of a county and now payable by the county council, under the Riot (Damages) Act, 1886; the registration of the rules of scientific societies; the registration of charitable gifts, the certifying of places of religious worship, and the confirming of the rules of loan societies; the maintenance of the assize courts, lock-up houses, police-stations, and county buildings generally; the maintenance of bridges and of roads repairable with bridges and of main roads (*a*); the enforcement of the Contagious Diseases (Animals) Acts, and of the Acts relating to destructive insects, and to the protection of fish and of wild birds, and to the prevention of river pollution; the supervision of weights and measures, and of gas-meters; the conduct of parliamentary elections (including the registration of voters and the revision of the lists of voters); the appointment and payment of medical officers (*b*), and of public inspectors and analysts, and the like, and of the county treasurer and county surveyor, and of the coroner for the county (*c*),

(*u*) 52 & 53 Vict. (1889), c. 61; 53 & 54 Vict. (1890), c. 41; 54 & 55 Vict. (1891), c. 62.
(*x*) Act of 1888, s. 3.
(*y*) See *post*, bk. IV. pt. III. ch. IX.
(*a*) Act of 1888, s. 11.
(*b*) *Ibid.* s. 17.
(*c*) *Ibid.* s. 5.

and of district coroners; also, all business formerly done by the justices of the county in quarter sessions in respect of music and dancing licences and race-course licences (*d*), or done by the justices out of sessions in respect of the licensing of houses or places for the public performance of stage plays, or in respect of the execution (as local authority) of the Explosives Act, 1875. The county council is, as we have said, primarily charged also with the maintenance of main roads, but the urban authority of the district may retain the duty of maintaining and repairing the same (*e*), as ordinary roads, receiving in that case from the county council an annual contribution towards the costs of such maintenance and repair (*f*); and the county council may also contribute to the cost of any highway or public footpath in their county, although the same should not be a main road. Every county council may also make by-laws within its county, relating to all or any of the matters aforesaid, in like manner as the council of a borough may make by-laws, in relation to its borough, under the Municipal Corporations Act, 1882; but the by-laws of a county council are not operative in any borough (*g*).

The Local Government Act, 1888, also provides for the establishment of a local taxation account at the Bank of England, into which account are to be paid the proceeds of the duties collected within the county by the Inland Revenue Commissioners on the "local taxation licences" specified in the first schedule to the Act (*h*), being wine and spirit licences, ale, beer, and tobacco licences, game licences, carriage taxes, and the like. The amount ascertained to have been collected in each county on these "local taxation licences" is certified by the Commissioners

(*d*) Act of 1888, s. 3.

(*e*) *Ibid.* s. 11.

(*f*) *Ibid.*; and as to roads in the Isle of Wight, see s. 12; and as to roads in South Wales, see South Wales Highways Act, 1860, and the Act of 1888, s. 13; 41 & 42 Viet. (1878), c. 34.

(*g*) Act of 1888, s. 16.

(*h*) *Ibid.* s. 20.

of Inland Revenue, and, having been paid into the local taxation account, is to be paid out under the direction of the Local Government Board to the county council for the uses of the county, being in lieu of the grants previously made from the Imperial Exchequer in aid of local taxation; and such payments to the county council are carried to a separate account called the Exchequer Contribution Account of the council (*i*). The Act also provides for payment to the like account, and for the like uses, of four fifth parts of one equal half part of the probate duties collected each year within the county (*k*), or now the equivalent amount of the estate duty (*l*), this also being a tax assigned in lieu of the imperial grants previously made in aid of local taxation. Elaborate provisions are contained in the Act for the distribution and application in a specified order (sect. 23) of the sums for the time standing to the Exchequer Contribution Account, *e.g.*, to pay, out of the Exchequer Contribution Account, to the guardians of poor law unions a certain amount (to be certified by the Local Government Board) towards the remuneration of teachers in poor law schools and of public vaccinators, and also the school fees paid for pauper children sent from workhouses to public elementary schools; and, under the Education Act, 1902, the county council as local education authority administers the education grants in aid. The county council is required also to pay to the local authority one half the salary of the medical officer and nuisance inspector of such authority; and to pay a certain amount to the registrars of births and deaths, and four shillings a week for the maintenance of every pauper lunatic chargeable to the county, or to any poor law union wholly or partly within the county, or to any borough within the county. Finally, the county council is required to transfer to the police account of the

(*i*) Act of 1888, s. 23.
(*k*) *Ibid.* ss. 21, 22, 24.
(*l*) Finance Act, 1894, s. 19.

county a part of the cost of the pay and clothing of the county police, and to pay to the council of every borough, maintaining a separate police force under the County and Borough Police Acts, a similar proportion of the cost of the pay and clothing of such police force ; besides making certain other payments.

The Local Government Act, 1888, further provides,—for the purposes of the police, and of the clerk of the peace, and the clerks of the justices, and joint officers, and of matters requiring to be determined jointly by the quarter sessions and the council of a county,—that there shall be a standing joint committee of the quarter sessions and the county council (*m*), consisting of such equal number of justices appointed by the quarter sessions, and of members of the county council appointed by that council, as may from time to time be arranged between the quarter sessions and the council ; and in default of arrangement, such number, taken equally from the quarter sessions and the council, as may be directed by a secretary of state. It is further provided, that any dispute arising under the Act with respect to the police, or to the clerk of the peace, or to clerks of the justices, or to officers who serve both the quarter sessions or justices and the county council, or to the provision of accommodation for the quarter sessions or for the justices out of session, or to the use by them or the police or the said clerks of any buildings, rooms, or premises, or with respect to anything incidental to the above-mentioned matters, and any other matter requiring to be determined jointly by the quarter sessions and the county council, shall be referred to and determined by the joint committee ; and the expenditure required for the purposes of the matters above mentioned, is to be paid out of the county fund, and the county council is to provide for such payment accordingly.

Every county council is incorporated, though the

(*m*) Act of 1888, s. 30.

inhabitants of the county are not. Its status is in some respects less independent than that of a municipal borough, as all its by-laws and accounts are subject to the supervision of the Local Government Board; moreover, it has no power to promote a private bill in parliament, though legislation to enable it to do so has been several times attempted. It has succeeded to all the property and also to all the liabilities of the old county, and has acquired full powers of management of, and also full power (with the sanction of the Local Government Board) to alienate, the county property (*n*); and it is enabled to acquire lands as fully as any urban authority under the Public Health Act, 1875 (*o*). All moneys received by the county council are to be carried to the county fund, and all payments for general county purposes, or for special county purposes, are to be paid in the first instance out of the county fund; general county purposes being purposes affecting the administrative county generally, and special county purposes being purposes affecting a part or parts only of such county (*p*).

The county council may also (with the sanction of the Local Government Board) borrow money on the security of the county revenues (*q*), up to the limit of one-tenth of the rateable value of the rateable property within the county, but not beyond that limit, except under the authority of a provisional order of the Local Government Board, confirmed by Act of Parliament; and such loans may be contracted for any purpose for which quarter sessions were authorized to borrow, for the discharge of old loans, and for any permanent work which the council is authorised to do (*r*). The council may raise such moneys, either as one loan or as several loans, and either by stock issued under the Act, or by debentures or annuity

(*n*) Act of 1888, s. 64.
(*o*) *Ibid.* s. 65.
(*p*) *Ibid.* s. 68.
(*q*) *Ibid.* s. 69.
(*r*) *Ibid.*

certificates under the Local Loans Act, 1875, or by mortgage (in special cases) under the provisions of the Public Health Act, 1875 (*s*); and generally, county stock may be created and issued, transferred, dealt with, and redeemed, as provided by the regulations made for that purpose by the Local Government Board (*t*).

The receipts and expenditure of every county council, as of all other local authorities except borough councils, are annually audited by district auditors appointed by the Local Government Board (*u*), up to the end of each financial year, *i.e.*, for the twelve months ending on the 31st March. At the beginning of each financial year, the county council estimates the amount required for the first six months and for the second six months of the then next financial year (*x*). Every county council must appoint a finance committee for regulating and controlling the finances of the county; and a resolution of the council, on the recommendation of such committee, is necessary to any order of the council for payment of any sum out of the county fund (*y*). All payments to or out of the county fund are to be made through the county treasurer.

Where the administrative county is a county borough, the council of the county borough has in general all the like powers, and is under all the like duties and liabilities, as the county council, and is entitled to participate in the proceeds of the duties carried to the local taxation account, and in the estate duty grant (or equivalent collection) for the county in which the county borough is situate, and the council of the county borough makes the like payments thereout as are made by the county council (*z*); and provision is made under the Act for all necessary equitable adjustments between the county council and the

(*s*) Act of 1888, s. 69.
(*t*) *Ibid.* s. 70; 58 & 59 Vict. (1895), c. 32.
(*u*) Act of 1888, s. 71.
(*x*) *Ibid.* s. 74.
(*y*) *Ibid.* s. 80.
(*z*) *Ibid.* ss. 32—34.

council of the county borough (*a*). The bridges within the borough repairable by the county, and the main roads within the borough, are made repairable by the county borough; and the council of the county borough may appoint the coroner where the district of the county coroner is wholly situate within the county borough (*b*). Where a borough is a quarter sessions borough, and has a population of 10,000 and upwards, according to the census of 1881, but is not made a county borough by the Act, it falls indeed within the administrative county in which it is situate; but the powers, duties, and liabilities of the council of the borough under the Municipal Corporations Act, 1882, remain with the council of the borough, and do not pass to the county council (*c*). Nevertheless, the parishes within such borough are made liable to contribute, as a general rule, to the costs of all general county purposes, but with certain exemptions (*d*). The county council succeeds to the powers, duties and liabilities of an administrative character which were, previously to 1888, vested in the court of quarter sessions or justices of any borough, which is not made a county borough (*e*).

The decision of any differences arising between or among adjoining councils (or other adjoining local authorities), is committed to the Local Government Board, which may either itself arbitrate the matter, or refer it to some other arbitrator (*f*).

By subsequent Acts, county councils have been authorized to contribute to the funds of the Association of County Councils, an association formed for the purpose of consultation as to various matters of local government (*g*); also, to combine with the councils of adjoining counties, in relation to the construction, maintenance and

(*a*) Act of 1888, s. 32.
(*b*) *Ibid.* s. 34.
(*c*) *Ibid.* s. 35.
(*d*) *Ibid.*
(*e*) *Ibid.* ss. 36, 39.
(*f*) *Ibid.* ss. 11, 63; 59 & 60 Vict. (1896) c. 9.
(*g*) 53 & 54 Vict. (1890), c. 3.

alteration of main roads and highways, and of bridges, including the approaches thereto (*h*); to contribute to the expenses of enquiries before the charity commissioners touching any charity in which their county is interested (*i*); to buy up manorial franchises relative to weights and measures (*k*); and to do many other matters, of a greater or less importance, entrusted to these councils and to the parish councils shortly to be mentioned, relative to allotments and small holdings (*l*), and to the protection of public rights and the like. They may also cause barbed-wire fencing along highways to be removed, when likely to be a nuisance to man or beast (*m*).

III. Parish Councils and Parish Meetings.

The principle of local self-government, applied to boroughs in 1835 by the Municipal Corporations Act, and half a century later, by the Local Government Act, 1888, to the counties, received another large extension under the Local Government Act, 1894 (56 & 57 Vict. c. 73). By that Act, there has been appointed, in every rural parish throughout England and Wales containing a population of 300 or upwards, a parish council elected by the parochial electors on the register (*n*); moreover, in every rural parish having a population of less than 300, but more than 100, a parish council *may* be established by the county council, and *must* be established if the parish so demand. If the population of a parish is less than 100, the county council may either allow or refuse a request for a parish council. The demand for a parish

(*h*) Highways and Bridges Act, 1891.

(*i*) 55 & 56 Vict. (1892), c. 15.

(*k*) *Ibid.* c. 18.

(*l*) Allotments Act, 1890; Small Holdings Act, 1892; and Local Government Act, 1894.

(*m*) Barbed Wire Act, 1893, s. 3 (2).

(*n*) By sect. 44, this register is the local government register of electors and the parliamentary register of electors, so far as they relate to the parish or (as the case may be) to the parish ward.

council is not very frequent, because in *every* rural parish there is also established by the Act a parish meeting or general assembly of "parochial electors" (sects. 1 and 2). A parish council (sect. 3) is constituted a body corporate, by the name of the parish council of the parish; and when there is no parish council, but only a parish meeting, for any rural parish, the chairman of such meeting and the overseers of such parish (sect. 19), are constituted a body corporate, by the name of the chairman and overseers of the parish. Each of such corporate bodies (council or meeting) has perpetual succession, and power to hold lands for the purposes of the parish without a licence in mortmain. In parishes where a parish council exists, the principal function of the parish meeting is to elect the parish council; and since 1901 this is only done once in three years (*o*). If there are more candidates than seats, the chairman must take a show of hands, and any five electors may demand a poll, which will be taken by ballot on the first Monday in April, or (if that is Easter Monday) on the last Monday in March. Where a rural parish is situate partly within, and partly without, a rural sanitary district, each part of such parish is, for the purposes of the Act, made a parish of itself, as if it had been so constituted under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61); and for the purposes of the Act, parishes may be divided into wards (sect. 18), with councillors separately elected for each ward. The annual assembling of the parish meeting is held on some day between the 1st March and 1st April in every year (Local Government Act, 1897), and the parish council holds an annual meeting on or within seven days of April 15th (*o*).

To the parish council and, in parishes which have no parish council, to the parish meeting so constituted, are

(*o*) Parish Councillors (Tenure of Office) Act, 1899 (62 & 63 Vict. c. 10).

entrusted, among many other details, the following powers and duties (sects. 5, 6), that is to say:—(1) The power and duty of appointing overseers of the poor, and the power of appointing (and of revoking the appointment of) an assistant overseer; (2) The powers, duties and liabilities of the vestry of the parish except so far as relates to the affairs of the church, or to ecclesiastical charities; (3) Power to appoint trustees of charities in lieu of overseer and churchwarden trustees; (4) Power to consent to the stopping up or diversion of rights of way within the parish, or to the declaration that a highway is unnecessary, and power to complain to a county council of the default of a rural district council; (5) The powers, duties, and liabilities of the overseers, or of the churchwardens and overseers, of the parish, relative to valuation lists (appeals and objections therefrom or thereto), or relative generally to the poor rate, or to the county rate, or to the basis of the county rate, to the provision of parish books, and of a parochial office, or vestry room, of a parish chest, and of a fire-engine or fire-escape, to the holding or management of the parish property (other than property belonging to the church, or held for any ecclesiastical charity), to the holding or management of village greens, and of allotments, whether for recreation grounds, or for gardens, or otherwise for the benefit of the inhabitants, or any of them, and the powers exerciseable, with the approval of the Local Government Board, by the board of guardians for the poor law union comprising the parish, in respect of the sale, exchange, or letting of any parish property. And in parishes with a parish council the parish council has these additional powers: (6) The powers, duties, and liabilities of the churchwardens of the parish (except as aforesaid), including their duties with respect to maintaining and repairing closed churchyards wherever the expenses of such maintenance and repair are, under the Burial Act, 1855, repayable out of the poor rate after the churchwardens have

given, under that Act, a certificate of their expenses ; (7) Certain "additional powers" in regard to the provision of water, recreation grounds, the acquisition of rights of way, and for dealing with insanitary ditches and drains ; (8) Power to acquire land and to let it for allotments.

In addition to the powers above mentioned, the parish council may also make the complaints, as to unhealthy dwellings for artisans, authorised by the Housing of the Working Classes Act, 1890, and the representations required to be made by the Allotment Acts, 1887 and 1890, with regard to allotments. And further, on the application of the parish meeting, the county council may confer upon it any of the powers conferred exclusively on a parish council by the Local Government Act, 1894 (s. 19 (10)). When a parish council is unable to procure by agreement land for its necessary purposes, or for allotments, it is to bring the matter before the council of the county within which it is situated ; and the county council may thereupon confer upon the parish council power to acquire the land compulsorily under the Lands Clauses Acts and the Railways Clauses Consolidation Act, 1845, ss. 77—85 (*p*). The parish *meeting* has the exclusive power of adopting such Acts as the Baths and Washhouses Acts, 1846 to 1882, the Public Libraries Act, 1892, and other like Acts, called by way of distinction "adoptive Acts," tending to secure the physical and moral health and recreation of the people. And we may here observe, that the county council is charged generally, subject to an appeal to the High Court, or to the confirmation of the Local Government Board, with the supervision of the working of the Act ; and that council also intervenes for the removal of certain difficulties which may arise between parish councils and rural district councils.

By subsequent Acts, parish councils have been authorized to contribute to any expenses incurred jointly

(*p*) See Local Government Act, 1894, s. 9.

with any other council in carrying out the provisions of the Burial Acts, 1852 to 1885 (Local Government (Joint Committees) Act, 1897); and also to any joint expenses incurred in connection with the provision or use of joint fire-engines (Parish Fire-Engines Act, 1898), or of better postal telegraph facilities (Post Office Amendment Act, 1895, and Post Office (Guarantee) Act, 1898).

For any of the following purposes, viz.: (1) for the purchase of any land, or for the building of any buildings, which the parish council may lawfully purchase or build; (2) for any purpose authorized by such of the "adoptive Acts" above referred to as the parish council may have adopted; and (3) for any permanent work or other thing which the parish council may lawfully execute or do,—the parish council may, with the consent of the county council and of the Local Government Board, borrow money in like manner and subject to the like conditions as a local authority may borrow under the provisions of the Public Health Act, 1875; the loan being secured on the poor rate and on other the revenues of the parish council, and the power to borrow being limited to one-half of the assessable value of the premises assessable within the parish (*q*).

The expenditure of parish councils and parish meetings is severely restricted. A parish council may not, without the consent of a parish meeting, incur expenses or liabilities which will involve a rate exceeding threepence in the pound for any local financial year, or which will involve a loan. Further, a parish council's expenses (other than under the adoptive Acts) must not exceed a sum equal to a rate of sixpence in the pound for any year; and the expenses of a parish meeting, where there is no parish council, must not all together exceed a sum equal to a rate of sixpence in the pound. The expenses of both bodies are, subject to the provisions of the Act, to be paid out of the poor rate (*r*).

(*q*) Local Government Act, 1894, s. 12.

(*r*) *Ibid.* s. 11.

IV. Urban and Rural District Councils.

The Local Government Act, 1894, also makes further provision for the government of urban and rural sanitary districts. By section 21, urban sanitary authorities are to be styled "urban district councils," and the district of every urban authority is to be called an "urban district." It is also provided that there shall be a rural district council for every rural sanitary district, and that its district shall be called a "rural district," and further that the term "district council" shall comprise both urban and rural district councils, and that the term "county district" shall comprise both urban and rural districts. Urban and rural district councils have a similar history, a similar constitution, and similar powers. Certain important differences in their positions, however, will appear, which are due to the very great differences which exist between the areas which they respectively serve. Apart from formal law, there is more similarity between the working of an urban district council and a borough council, than between an urban and a rural district council. Both urban and rural district councils were originally merely sanitary authorities, and public health, in the widest sense of the term, is still their principal business. In each case the constituency consists of all parochial electors in the district. Neither as regards electors or candidates is there any disqualification for sex. There are no aldermen on urban and rural district councils. District councillors are elected for a term of three years, one-third retiring annually, unless the council desires that all should retire simultaneously, and the county council makes an order to that effect. All rural district councillors are guardians of the poor; and in purely rural unions, the two bodies are practically identical, though the business of the district is always kept distinct from that of the union. By section 25 of the Local Government Act, 1894, there are transferred to every rural district council all the powers,

duties, and liabilities, as well of the existing rural sanitary authority in the district, as of the highway authority. By section 26, every district council is charged with the protection of public rights of way, public rights of common, and public rights over road-side wastes; and (by s. 27) with the licensing of gang-masters, dealers in game, passage brokers, emigrant runners, and knackers' yards, the abolition of fairs and fixing of fair days, and the local execution of the Acts relating to petroleum and infant life protection. Moreover some functions previously performed by justices out of sessions are now transferred to district councils. The Act contains also provisions (ss. 28, 29) for meeting the expenses of district councils. The principal financial resource of an urban district council is the general district rate; which it has power to levy by its own officials, and which is unlimited in amount. The expenses of a rural district council may be either general or special. In the latter case, they are charged on a particular parish or contributory place within the district; in the former, by a general levy on all the parishes in the district. But, in both cases, they are levied by the overseers along with, or as part of, the poor rate, not by the officials of the council. The Act further provides for greater simplicity and uniformity of administration, so that each parish may be in one county district, and so that each rural district may be in one administrative county (s. 36). For this purpose, and for convenience of administration, parishes may be grouped, or separated, and sanitary districts may be altered.

The chairman of a district council need not be a member of the council. He is appointed by the council for one year, and (unless a woman or personally disqualified by any Act) is *ex officio* justice of the peace for the county during his term of office.

A rural district council is an intermediate authority between a parish meeting or parish council, and a county council. But in an urban district there is no parish

meeting or parish council. The vestry therefore remains, though its power to appoint overseers, as well as the powers of overseers, may be transferred to the council of an urban district or borough by an Order of the Local Government Board (s. 34).

Consequently, some powers possessed by a parish council are not possessed by any local authority in an urban district. The Act therefore provides that the Local Government Board may, on the application of the council of an urban district or borough, confer upon that council any of the powers, duties, or liabilities of a parish council. Similarly, in order that a rural district council may be able to meet the demands of any part of its district which is urban in character, the Public Health Act of 1875 (s. 276), and the Local Government Act, 1894 (s. 28), provide, that the Local Government Board may, by general or special Order, confer urban powers upon rural district councils.

The highway powers and sanitary functions of district councils will be dealt with in the two succeeding chapters of this work.

CHAPTER IV.

OF THE LAWS RELATING TO HIGHWAYS AND BRIDGES.

THE law relating to highways, like the law relating to public health, was for some time in the middle part of the nineteenth century administered (in many districts of the kingdom) by "ad hoc" authorities, or boards, elected by the inhabitants to manage the roads of a local area. A HIGHWAY, in the full sense, is a public road over which all the subjects of the realm have a right to pass and repass. The sub-soil of all roads is, by presumption of law, in the adjoining owner on either side of the road, *usque ad medium filum viæ*; but the presumption may of course be rebutted (*a*). The surface is vested in the highway authority: but it is difficult to say how far downwards the "surface" extends. The term "highway" is not restricted to any particular kind of way, and it often includes those roads or ways, *e.g.*, church paths, which are common to the inhabitants of some particular parish or district only (*b*); and a road may be a public road or highway, although it may not be a thoroughfare. Highways exist by prescription or long user by the public, or have been constructed under the authority of local Acts of Parliament. Or again, they may have originated in the dedication of the owner of the soil over which they pass; for an owner may *expressly* dedicate a way over his land

(*a*) *Pryor* v. *Petre*, [1894] 2 Ch. 11.

(*b*) In the Highway Act, 1835, s. 5, the term "highways" is made to include "all roads, "bridges (not being county "bridges), carriageways, cart-"ways, horseways, bridleways, "footways, causeways, church-"ways, and pavements."

to the use of the public, and, if he permit strangers for a long period to pass over it, at their free will and pleasure, and without molestation, that may, in the absence of rebutting circumstances, amount to an *implied* dedication (*c*). Such dedication, whether express or implied, may be either absolute, or subject to some qualification or condition, or to some pre-existing right of user. Thus, a towing-path can only be enjoyed as a footpath subject to its main use for towing (*d*); but when a road has become public, the grant, whether express or implied, is irrevocable. "Once a highway always a highway."

The parish was usually obliged to keep in repair any highway within its boundaries, whatever the origin of the road; but, in some cases, the liability to repair attached to a particular township, or other division of the parish. There exists also another class of highways which the private occupier of lands is bound to repair as a condition of his estate, *i.e.*, *ratione tenuræ* (*e*); but an occupier may have the right to claim (by grant or prescription) from those who use the road, what is called a *toll traverse*, being a toll taken for passage over the soil of a private owner, as distinguished from a *toll thorough*, which latter toll is still sometimes taken for passing along or over a highway or public road. A liability to repair *ratione clausuræ* an ancient highway running through hitherto unenclosed lands, may attach to the occupier, by reason of his enclosing the lands, and thereby depriving the public of their immemorial right to deviate thereon when the highway is *foundrous* (*i.e.*, out of repair) (*f*).

(*c*) *Poole* v. *Huskinson* (1843), 11 M. & W. 827.

(*d*) *Poole* v. *Huskinson*, *supra*; *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273.

(*e*) Turnpike Roads Act, 1822, s. 107; Highway Act, 1835, s. 62; *R.* v. *Ramsden* (1858), El. Bl. & El. 949.

(*f*) *R.* v. *Ramsden*, *ubi sup.* The liability *ratione clausuræ* does not now arise when the occupier of lands has obtained the consent in writing of the highway authority to the erection of fences. (Highway Act, 1862, s. 46.)

The expense of maintaining bridges is usually defrayed (like that of roads) by the public, this having been part of the *trinoda necessitas*, to which every man's estate was by the antient law subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio*. The burthen of such repair was, however, in general, not on the parish, but on the county at large in which the bridge was situate (*g*), although an individual might be bound *ratione tenuræ* to repair the bridge, or some particular borough within the county might be liable, and not the county at large (*h*); and where a parish was bound by prescription to repair some particular bridge, the parish might contract with the county for the future repair of such bridge at the expense of the county (*i*). The liability of the county extended, at common law, not only to the bridge itself, but to so much of the road as passed over it, and to its ends or approaches; and by the 22 Hen. VIII. (1530) c. 5, the county was made liable to repair three hundred feet either way from the bridge. Such in general is still the law, as to the repair of bridges built prior to the Highway Act, 1835 (5 & 6 Will. IV. c. 50). But, by that statute, it was provided, that, in the case of all bridges *thereafter* to be built, the repair of the road itself passing over the bridge (together with the approaches thereto at either end) should be done by the parish, or other the parties bound to the general repair of the highways; and that the county should remain subject to its former obligation, only as regards "the walls, banks, or "fences of the raised causeways, and *raised* approaches to "any bridge, or the land arches thereof" (*k*). Since

(*g*) Viner Ab. *Bridges* (A); Bridges Act, 1803, s. 5; Highways and Locomotives (Amendment) Act, 1878, ss. 21, 22.

(*h*) Municipal Corporations Act, 1882, s. 119.

(*i*) 22 Hen. 8 (1530), c. 5; *Hewitt* v. *Nottingham Tramways Co.* (1883), 12 Q. B. D. 16.

(*k*) Highway Act, 1835, s. 21; *cf.* the Highways and Locomotives (Amendment) Act, 1878, ss. 21, 22.

1888, the county authority for main roads and county bridges has of course been the county council. And inasmuch as, before the Highway Act, 1835, a parish was liable for the repair of all roads within it, dedicated to and used by the public, although there had been no adoption of such roads by the parish, the Act provided that no road, made at the expense of any individual or body corporate, should be a highway which the parish was liable to repair, unless three calendar months' notice should be given to the highway authority, of the intention to dedicate such road to the public (*l*); and where such notice was given, it was for the highway authority to consider whether the road was of sufficient utility to justify its being kept in repair by the parish. If it considered the road unnecessary, the justices, at the next special sessions for highways or in petty sessions, were finally to determine the matter; and the Act contained also provisions for ensuring, that the road should have been constructed in a proper and substantial manner, before the expense of repairing it was cast upon the parish (*m*).

Any parish, district, county, borough, or person, who is bound to repair either a road or a bridge, and who neglects the duty, is liable at common law to be punished on indictment (*n*); and to such an indictment,—at least when laid against a parish,—the plea in defence must show, not merely that the parish is not liable, but that some other party is liable, for the repairs (*o*). The justices may, and in some cases must, order an indictment to be preferred (*p*). But though each parish or township or other district, through whose lands any portion of a highway passed, was liable by the general law of the land to maintain such portion, special provisions were passed by the legislature from time to time for keeping in repair some of the most

(*l*) Highway Act, 1835, s. 23.

(*m*) *Ibid.*

(*n*) *R.* v. *Eyton* (1854), 3 El. & Bl. 390.

(*o*) *Rex* v. *Eastrington* (1836), 5 A. & E. 765; *Rex* v. *St. Giles', Cambridge* (1816), 5 M. & S. 260.

(*p*) Highway Act, 1835, s. 95.

frequented and important roads of the kingdom. Many such roads were formerly maintained, (and some were originally constructed,) under the authority of local *Turnpike Acts*. Under those enactments, the management of such roads was usually vested, for a term of years, in trustees or commissioners, who were empowered thereby to erect toll-gates, and to levy tolls from those who passed through, as a fund for defraying the expenses of repairs or improvements; and there was, therefore, a distinction between *highways in general*, and *turnpike roads*. But the collection of such tolls did not supersede the other means provided by the law for maintaining highways and bridges; and therefore, if a turnpike road, or the bridge over which such road passed, was allowed by the trustees to fall out of repair, the parishes or other parties who would have been bound to repair it, were still, as a general rule, liable to that obligation. Also, when any turnpike road became again, by the determination of the turnpike trust, an ordinary highway, any balance of moneys in the hands of the trustees was paid over by them rateably amongst the parishes which, upon such determination of the trust, became again bound to maintain the road.

It will thus be seen, that highways were formerly divided into Highways in General and Turnpike Roads,—a twofold division not yet entirely superseded, seeing that many of the old turnpike roads have become by later legislation *main roads*.

I. *Highways in General*.—The principal enactments under which highways are now made, repaired, and controlled, are the Highway Acts, 1835 to 1885, the Public Health Act, 1875, the Local Government Acts, 1888 and 1894, and the Locomotives Act, 1898 (*q*).

The plan of the Highway Act, 1835 (5 & 6 Will. IV. c. 50), was to place highways under the care of *surveyors*

(*q*) 61 & 62 Vict. c. 29.

appointed for their respective parishes, subject to the superintending power of the justices of the peace at special sessions holden for the highways; and the Act provided, that the expense of maintaining and repairing the highways should be met by a rate, to be made and levied by the surveyor, on the occupiers of land, upon the principle of the poor rate (*r*). The surveyor of highways was elected annually, by the inhabitants in vestry assembled; and he was required to possess certain property qualifications. When elected, he was compellable, unless he could show some like ground of exemption as applied to an overseer of the poor, to undertake the office. The office was not a paid one; but the vestry might, if they thought proper, appoint a salaried surveyor, and any two or more parishes might, by mutual agreement, with the consent of the justices in sessions assembled, and for the purposes of the Act, unite themselves into one district, so as to be under the superintendence of a *district surveyor*. But that officer had no authority to make or levy the highway rate, each parish still electing its own separate surveyor for that purpose. The provisions with regard to the election and qualification of the surveyor are now obsolete, as, under the Public Health Act, 1875 (sect. 144), and the Local Government Act, 1894, in all urban districts the town council, or urban district council, are the surveyors, and have the management of highways; and rural district councils are made highway authorities, and as such have to perform most of the functions of surveyors of highways, though they do not actually become surveyors of highways.

The principal duty of the surveyor was to keep the parish highways in repair (*s*). Where any of these were out of repair, complaint might be made to any justice of the peace, who might grant a summons thereon, although

(*r*) Highway Act, 1835, ss. 27, 113.

(*s*) *Ibid.* s. 6.

the charge itself was to be heard before the justices at special sessions for the highways, or at petty sessions. And if those justices—either on their own view, or on the report of an inspector to be appointed by them for the purpose,—found that a highway was not in thorough and effectual repair, they might convict the surveyor of highways in a penalty not exceeding 5*l*., and order him to repair within a limited time; and if such order were not complied with, the surveyor incurred the further forfeiture of such sum as should be judged adequate to the probable expense of the repairs required, the money to be applied accordingly to that purpose (*t*). The borough or district council is now liable to the same proceedings as the old surveyor of highways, if it neglects to repair any highway within its district. And the same summary procedure is applicable, *mutatis mutandis*, to the case where an occupier is chargeable *ratione tenuræ*. But the justices have no power to make such an order in any case where the *obligation* to repair is in question (*u*); for in that case, the remedy is by indictment only, the indictment being preferred, by order of the justices, against the council or party charged before them, at the next assizes or quarter sessions for the county or place where the highway is situate (*x*). But the indictment is, in general, removed, on *certiorari*, into the King's Bench Division (*y*).

Any injury whatever done to a highway, by which it is rendered less commodious to the persons using it, is a public nuisance, and (as such) an indictable offence at common law; and any person may also abate the nuisance, wherever this remedy is applicable, by removing the thing

(*t*) Act of 1835, s. 94.

(*u*) *Ibid.*

(*x*) Sect. 95. The statutes only apply when the road is out of repair and is an admitted highway (*R.* v. *Farrer* (1866), 35 L. J. M. C. 210).

(*y*) *R.* v. *Sandon* (1854), 3 El. & Bl. 547. The county council have now power to prefer a bill of indictment against the authority alleged to be in default; *cf. R.* v. *Wakefield* (1888), 20 Q. B. D. 810.

by which it is caused (*z*). But locomotives on roads, although at first treated as nuisances, are now permitted, subject to the provisions and within the limits prescribed by the statutes (*a*). Also, the surveyor is, by statute, specially required to remove all obstructions and encroachments on the highways (*b*), and to impound cattle found straying thereon (*c*); the statutes inflicting penalties on all persons who commit an injury to the highway, or who obstruct the free use thereof (*d*).

By the common law, the course of an antient highway could not be changed, without licence from the Crown, to be obtained after suing out a writ of *ad quod damnum*, and after the finding of an inquisition thereon that the alteration would not be prejudicial to the public (*e*); but, by the Highway Act, 1835, any two justices of the division may (subject to certain conditions and restrictions) order any highway to be widened or enlarged (*f*). Also, the inhabitants in vestry assembled might have directed the surveyor to apply to two justices of the division to view a highway, in order to have it diverted or stopped up. And this application may now be made by any highway authority, or by the parish council. The justices must view the place together, with the aid of a proper plan; and their certificate must be based on their inspection. They have to decide in case of a proposed diversion whether such diversion will make the road nearer or more commodious; and if so, they must set out how

(*z*) 1 Hawk. P. C. ch. 76, ss. 48, 61.

(*a*) 24 & 25 Vict. (1861), c. 70; 28 & 29 Vict. (1865), c. 83; 41 & 42 Vict. (1878), c. 77 (Part II.); 59 & 60 Vict. (1896), c. 36; *cf.* *Kent County Council* v. *Gerard*, [1897] A. C. 633, which led to the passing of the Locomotives Act, 1898, s. 12, with regard to damage done to highways by extraordinary traffic.

(*b*) Act of 1864, s. 51.

(*c*) Act of 1835, ss. 64—69; Act of 1864, s. 25.

(*d*) Act of 1835, s. 72; Act of 1864, s. 25.

(*e*) 1 Hawk. P. C. ch. 76, s. 3.

(*f*) Sect. 82.

much nearer or how more commodious. If the justices certify in favour of a diversion or stopping up, their certificate to that effect is sent to the quarter sessions, who make the order accordingly (*g*), the owner of the lands through which the new highway is to pass consenting thereto (*h*). But any person aggrieved by the proceeding may appeal from the certificate of the justices to the quarter sessions, before the order of that court is made (*i*); and in the case of such an appeal, the propriety of the stoppage or diversion is to be determined according to the verdict of a jury impanelled to try the question (*k*).

To amend the Act of 1835, other Highway Acts (25 & 26 Vict. (1862), c. 61; 26 & 27 Vict. (1863), c. 61; 27 & 28 Vict. (1864), c. 101; and 41 & 42 Vict. (1878), c. 77,) were passed; which, without disturbing generally the operation of the Highway Act of 1835, offered a new kind of highway authority which any particular county was at liberty to adopt. Under these Acts, the justices of any county, in sessions assembled, were empowered to form their county, or any part of it, into a *highway district* to be governed by a *highway board* (*l*); in which board were vested all the property, liabilities, and most of the powers of the surveyor of highways for the district (*m*). More than one such district might be formed in the county, or in any part of it; and, so far as possible, the districts were to be coincident in area with the rural sanitary districts of the county (*n*). Most of these provisions are, in substance, still in force. Under these Acts, the rural sanitary authority might, upon application to, and with the sanction of, the county authority, exercise within its district, the office of surveyor of highways, and become, in fact, the highway board (*o*). Otherwise the highway board consisted of *waywardens*, elected annually from the

(*g*) Act of 1835, ss. 84, 91.
(*h*) Sect. 85.
(*i*) Sect. 88.
(*k*) Sect. 89.
(*l*) Act of 1862, ss. 5—9.
(*m*) *Ibid.* s. 11.
(*n*) Act of 1878, s. 3.
(*o*) *Ibid.* ss. 4, 5.

several parishes within the district, together with the *justices* acting for the county, and residing within the district. The duties, powers, and liabilities of highway boards, which are now in almost all cases exercised by rural district councils, resemble, generally speaking, those thrown upon the surveyors of highways (*p*); and the procedure to compel a highway board to perform its duties, is analogous to that already mentioned with reference to such surveyors (*q*). Highway expenses in boroughs and urban districts are defrayed under section 216 of the Public Health Act, 1875; in rural districts they are defrayed as general expenses under sections 229 and 230 of the same statute. But the whole expense of maintaining and repairing them is borne by the county council (*r*). As regards the "extraordinary expenses" incurred in respect of the damage done to the highway or road in consequence of excessive weight or "extraordinary traffic," as (*e.g.*) by traction engines, the party by or in consequence of whose order the damage was done is liable to recoup the road authority (*s*).

II. *Main Roads.*—Main roads are roads vested in, and repairable at the expense of, the councils of counties and county boroughs. These, for the most part, are the successors of the old *Turnpike Roads*, formerly alluded to, which, by the provisions of the Highways and Locomotives (Amendment) Act, 1878 (s. 13) are now to be deemed *main roads*. But the highway authority may, with the sanction of the county authority, declare *any* highway within its district to be a "main road" (s. 15); and, by the like authority, a main road may be

(*p*) Act of 1862, s. 17; and Act of 1864, first schedule.

(*q*) Act of 1862, ss. 18, 19; Act of 1878, s. 10.

(*r*) Local Government Act, 1888, s. 11.

(*s*) Act of 1878, s. 23; Act of 1898, s. 12; cf. *Kent County Council* v. *Gerard*, [1897] A. C. 633; *Egham Rural District Council* v. *Gordon*, [1902] 2 K. B. 120.

reduced again to the character of an ordinary highway (s. 16).

Under the provisions of the Local Government Act, 1888 (*t*), the administrative business of the justices of the county in quarter sessions assembled, relative to bridges (and roads repairable with bridges), and the powers as to highways and locomotives thereon, which were heretofore vested in the county authority, are transferred to the county council established by section 3 of the Act; and a county council is authorized to purchase or otherwise acquire any existing bridges which are not county bridges, and to erect and maintain new bridges (s. 6). And as regards *main roads* within the Highways and Locomotives (Amendment) Act, 1878, above mentioned, the maintenance, repair, and improvement thereof (together with the bridges carrying the same, when repairable by the highway authority) are thrown upon the county council, which is to have for these purposes all the powers, and be subject to all the duties, of a highway board (s. 11). But any urban sanitary authority, that is to say, any borough or urban district council, may claim to retain such roads within its own district, and to receive, from the county council, an annual payment towards the expense of their maintenance and repair, and of their reasonable improvement (s. 11); and the county council may also contract with any district council, urban or rural (*u*), for the maintenance, repair, and improvement of main roads (s. 11). But before the county council declares any road to be a main road, it is bound to see that the road is in a proper state of repair.

As regards the main roads situate within any "county borough," these are transferred (with the cost of their maintenance, repair, and improvement) to the council of such borough; but as regards the main roads within

(*t*) 51 & 52 Vict. c. 41. (*u*) *Ibid.* s. 100.

other boroughs, these are to be dealt with as main roads of the administrative county within the area of which such boroughs are comprised (s. 35), although any urban sanitary authority may (by section 11) retain the powers and duties of maintaining and repairing its own main roads. And nothing in the Local Government Act, 1888, affects any liability to repair *ratione tenuræ* (s. 97).

Under the Local Government Act, 1894 (*x*), the district councils established by that Act for rural as well as for urban sanitary districts are now the highway authorities for such districts, and highway boards have ceased to exist (*y*); while rural district councils have succeeded to all the duties and have acquired all the rights of such boards, and of the highway powers of vestries, together with power to enforce the repairs of all highways that are repairable *ratione tenuræ* (s. 25). Rural district councils have also, as respects highways, "all the powers, duties, "and liabilities of an urban sanitary authority under "sections 141—148 of the Public Health Act, 1875." Moreover, every district council (urban or rural) is charged with the duty of protecting all public rights of way in its own or an adjoining district, and of preventing obstruction of paths and unlawful encroachment on road-side wastes. Parish councils may repair footpaths within their parish, and the consent of the parish council, as well as that of the rural district council, is required for the stopping up or diversion of any public right of way within a rural parish.

(*x*) 56 & 57 Vict. c. 73.

(*y*) Where there was no highway board, the powers of the rural district council as highway authority are less: *e.g.*, the council cannot act under the later part of s. 3 of the Highways and Bridges Act, 1891.

CHAPTER V.

OF THE LAWS RELATING TO THE SANITARY CONDITION OF THE PEOPLE.

Among the earliest enactments relating to the health of the people, may be instanced the statute 1 Jac. I. (1604), c. 31, regarding the plague,—under which statute, it was a capital felony for any person having a plague sore upon him uncured to go abroad and converse in company, after being commanded by the proper authorities to keep his house. But this statute, after being obsolete for many years, was repealed by the Punishment of Offences Act, 1837 (*a*).

The laws relating to *quarantine* are the next of the sanitary laws of an early date of which mention may properly be made,—*quarantine* being the term applied to that period of probation during which vessels arriving from countries infected with certain contagious disorders are placed in restraint by the law. All countries have more or less adopted some law of quarantine: the earliest known quarantine law being the edict of Justinian, A.D. 542. In our own country the first statute was 9 Anne (1710), c. 2; but that statute, with several others subsequently passed for its amendment, was repealed by the Quarantine Act, 1825 (*b*). This last statute, in its turn, has been repealed by the Public Health Act, 1896 (*c*), which has extended to the ports and harbours of the realm the provisions relating to "epidemic, endemic, and in-

(*a*) 7 Will. 4 & 1 Vict. c. 91, s. 4.

(*b*) 6 Geo. 4, c. 78.

(*c*) 59 & 60 Vict. c. 19.

fectious diseases," which are contained in the Public Health Acts hereinafter mentioned, the matter being also further provided for by the Public Health (Ports) Act, 1896 (*d*).

In the year 1832, on the occasion of the outbreak in this kingdom of the Asiatic cholera, the statute 2 & 3 Will. IV. c. 10, empowered the Privy Council to issue such orders as might appear to them expedient, with a view to the prevention of the spread of the disease, for the relief of persons afflicted thereby, and for the interment of its victims. This Act was continued by the 3 & 4 Will. IV. (1833), c. 75, until the end of the then next session of parliament ; but was not further continued, its continuance having become unnecessary by the disappearance of the epidemic, and by the establishment of those more general provisions for the prevention of disease, of which we shall presently give some account.

The prevention of *small-pox* has also for a long time been a subject of special legislation. In 1840 and 1841 (*e*), parliament, adopting the well-established result of Jenner's discoveries, forbad inoculation for small-pox, and provided for the gratuitous vaccination of all who wished for it. In 1853 (*f*), the vaccination of children within three months after birth was first made compulsory under penalties, and vaccination stations for arm-to-arm vaccination were provided. Later statutes (*g*) dealt with the qualifications of the public vaccinators, and the enforcement of the law. In 1867, a consolidating and amending Vaccination Act (*h*) was passed, which for the first time recognised public re-vaccination ; and the present law is comprised in it with its amending Acts (*i*), especially

(*d*) 59 & 60 Vict. c. 20.

(*e*) 3 & 4 Vict. c. 29 ; 4 & 5 Vict c. 32.

(*f*) 16 & 17 Vict. c. 100.

(*g*) 21 & 22 Vict. (1858), c. 97 ; 24 & 25 Vict. (1861), c. 59.

(*h*) 30 & 31 Vict. c. 84.

(*i*) 34 & 35 Vict. (1871), c. 98 ; 37 & 38 Vict. (1874), c. 75 ; 61 & 62 Vict. (1898), c. 49.

the Act of 1898, and the Local Government Board's Vaccination Order, 1898.

Under the present law, the several poor law unions and parishes not in union are divided into districts, for each of which the guardians have to contract with a duly registered medical practitioner, called the public vaccinator, to vaccinate or re-vaccinate all persons resident in his district; and it is his duty to *call at the home* of every unvaccinated and unexcused child in his district between the ages of four and six months, and offer to vaccinate it with *calf lymph* under certain prescribed safeguards (*k*). The production of small-pox by inoculation is punishable with one month's imprisonment (*l*). It is the duty of the parent or other person having the custody of every child to secure its vaccination before the age of *six* months by the public vaccinator or some other duly qualified medical man; and if he fails to do so without reasonable excuse, he is liable on summary conviction to a penalty of 20*s*. He is further liable to a similar penalty for neglect to comply with a specific order of a justice for the vaccination of a child within a limited period. But one of the chief features of the most recent Act of 1898 is that which exempts a parent from liability to these penalties, if within four months from the birth of the child he satisfies a police-magistrate, or two justices in petty sessions, that he conscientiously believes that vaccination would be prejudicial to the health of his child, and transmits a certificate of such objection to the vaccination officer. The same Act contains provisions restricting or prohibiting repeated proceedings against a parent in respect of the same child (*m*). It is incumbent on the guardians to appoint a vaccination officer or officers to enforce the law against parents who have failed to comply with it without legal excuse; and such officers may

(*k*) Act of 1898, s. 1; Vac. Order, 1898, sched. 1, 3.

(*l*) Act of 1867, s. 32.

(*m*) Act of 1898, ss. 2—4.

institute proceedings without any directions from the guardians, and even contrary to their directions (*n*). The cost of public vaccination and its enforcement is defrayed out of the poor rate ; but public vaccination is not parochial relief, and its acceptance entails no disqualification (*o*).

We now come to consider the more general provisions of the law for the preservation and improvement of the public health. Long before the year 1848, the necessity had been felt in cities and towns of providing for sewerage and drainage, water supply, the prevention of infectious diseases, and the like. And many local Acts were passed giving to the governing bodies of such places powers in connection with such matters. In 1847, an Act called the Towns Improvement Clauses Act (*p*), was passed, its object being to enable the same clauses to be incorporated by reference in any local or special Act. But apart from the local or special Act these clauses had no application. It was not until the year 1848 that the first Public Health Act was passed, and it may be said that this Act was the beginning of general sanitary legislation in this country.

The Public Health Act, 1848, provided for the establishment of a general Board of Health to superintend and control the execution of the Act. By another statute of the same year (*q*), the General Board were required, on being so ordered by the Privy Council, to issue directions and regulations to prevent or remedy epidemics and contagious diseases. In 1854 (*r*) the Board was re-constituted, and afterwards it was continued from year to year until 1858, when it ceased to exist, its powers for the prevention of disease being transferred to the Privy Council. In 1871 (*s*) the Local Government Board was created as it now exists, and to it were transferred the powers of the

(*n*) *Moore* v. *Keyte*, [1902] 1 K. B. 768.
(*o*) Act of 1867, s. 26.
(*p*) 10 & 11 Vict. c. 34.
(*q*) 11 & 12 Vict. c. 123.
(*r*) 17 & 18 Vict. c. 95.
(*s*) 34 & 35 Vict. c. 70.

Privy Council relating to vaccination and the prevention of disease, together with certain other powers formerly exercised by a secretary of state in relation to matters affecting the public health, such as baths and washhouses, artizans' dwellings, etc. Many other powers and duties have been conferred or imposed on the Board by later legislation. Some of them, in so far as they relate to sanitary matters, will be noticed further on, but it may be stated generally, that the Local Government Board controls to an important extent the administration of the sanitary laws by local bodies.

It would be unprofitable to enter here into a detailed consideration of the various sanitary Acts which extended and amended the Public Health Act, 1848, for these were all repealed, except in so far as they applied to the metropolis, by the Public Health Act, 1875 (*t*), which consolidated with amendments all the earlier statutes. But it may be stated here that, by the Public Health Act, 1872 (*u*), the whole of England and Wales was divided into urban sanitary districts and rural sanitary districts. This division was continued under the Act of 1875. Urban districts comprise municipal boroughs, in which the borough councils are the sanitary authorities, and populous districts formerly governed by local boards or improvement commissioners, now styled urban (district) councils (*x*). Rural districts are simply the areas of the poor law unions exclusive of any urban district within such areas; and they are governed for sanitary purposes by bodies now styled rural (sanitary) councils. The constitution and election of these local bodies have been dealt with elsewhere in this work (*y*).

The Public Health Act, 1875, and the numerous Acts amending it, deal with a great variety of matters; but

(*t*) 38 & 39 Vict. c. 55.
(*u*) 35 & 36 Vict. c. 79.
(*x*) Local Government Act, 1894, s. 21.
(*y*) *Ante*, bk. IV. pt. III. ch. III.

in this place we are concerned only with such of them as relate to health. All district councils are charged with the duty of providing sewers for the drainage of their districts. They may lay such sewers under streets and (on payment of compensation) in private land. They must also provide some means of disposing of the sewage flowing through the sewers; but they are expressly forbidden to cause or permit such sewage to pollute any river, stream, or lake. It may here be mentioned incidentally, that there are Acts known as the Rivers Pollution Prevention Acts, 1876, 1893, and 1898 (*z*), which provide machinery for preventing the pollution of streams by sewage or by the effluents from mines or manufactories; and that the power and duty of enforcing these Acts is imposed on district councils concurrently with county councils (*a*). The sewers within a district, whether provided by the council or by any other person or body are, with certain exceptions, vested in the council, whose duty it is to keep them in repair, and generally in such condition as not to be a nuisance. Questions often arise whether a thing is a sewer, in which case the liability is on the council, or a drain, in which case it is on the private individual whose property it is. It may be sufficient here to say, that a drain is that which receives the drainage of one building or of premises within the same curtilage, while a sewer is any other kind of drain, and particularly one which receives the drainage of two or more separate houses (*b*). The district councils are also charged with the duty of seeing that every dwelling-house is provided with drains sufficient for the effectual drainage thereof, and with sufficient sanitary conveniences, such as water-closets, earth-closets, or privies, and ash-pits, and that such drains and conveniences are kept in

(*z*) 39 & 40 Vict. c. 75; 56 & 57 Vict. c. 31; 61 & 62 Vict. c. 34.

(*a*) Local Government Act, 1888, s. 14.

(*b*) *Travis* v. *Utley*, [1894] 1 Q. B. 233.

proper order and condition. The district councils may themselves provide public conveniences.

District councils have also important powers and duties in connection with the cleansing of streets, the removal and disposal of house refuse, and the cleansing of privies, ashpits, and cesspools.

Following the order adopted in the Public Health Act, 1875, the next of the powers and duties of district councils relates to the provision of a water supply. This can be made by the construction, purchase, or lease of waterworks, and the purchase of necessary water rights, or by contracting with any person or body for a supply of water. The councils cannot, however, construct any waterworks within the limits of supply of any company which has parliamentary powers of supply, as long as that company is able and willing to afford a supply proper and sufficient for public and private purposes. When councils do supply water, they may charge water rates and rents, and act generally in the same way as a company under the Waterworks Clauses Acts, 1847 and 1863 (*c*), the provisions of which are for the most part incorporated with the Public Health Act, 1875. Councils are also empowered and required to see that inhabited dwelling-houses are properly supplied with water, and the owners of such houses may be compelled to provide a supply, either under the Act of 1875 (s. 62), or under the Public Health (Water) Act, 1878 (*d*), which gave the councils increased powers, especially in rural districts. All public pumps, wells and works used for the gratuitous supply of water to the inhabitants of a district are vested in the council of that district: and the council have power to close polluted wells, whether public or private.

It is only possible in the space at command to mention that district councils have important powers and duties

(*c*) 10 & 11 Vict. c. 17, and 26 & 27 Vict. c. 93.

(*d*) 41 & 42 Vict. c. 25.

with reference to the occupation of cellar dwellings, the registration and inspection of common lodging-houses, and the regulation by means of by-laws of houses (other than common lodging-houses) let in lodgings. But the subject of nuisances requires more attention. The Act of 1875 (s. 91) enumerates certain things which are described as nuisances liable to be dealt with summarily. These include premises in such a state as to be a nuisance or injurious to health : any pool, ditch, privy, cesspool, drain, ashpit, etc., in a similar state : any animal kept so as to be, and any accumulation or deposit which is, a nuisance or injurious to health : any house which is overcrowded : any factory not kept clean or properly ventilated, or overcrowded : any furnace which does not consume it own smoke : and any chimney (not being a chimney of a private dwelling-house) which gives off black smoke in such quantity as to be a nuisance. Councils are required on being informed of any of these nuisances to serve a notice on the person causing them, or, if he cannot be found, on the owner or occupier of the premises where they exist, requiring him to abate the nuisance. If he fails to do so, he may be summoned before the justices, who may make an order upon him to abate the nuisance or to prevent its recurrence ; and if he does not obey the order he is liable to penalties. If it is thought that the summary remedy is insufficient, a council may bring an action for an injunction in the High Court ; but in that case the courts have held that the action must be in the name of the Attorney-General (*e*). Penalties are imposed on persons who newly establish certain offensive trades in urban districts ; and powers are conferred on urban councils to restrain the carrying on of trades which cause effluvia.

The provisions of the Act of 1875 relating to unsound meat are now, by the Public Health Acts Amendment Act,

(*e*) *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593 ; *Tottenham Urban District Council* v. *Williamson*, [1896] 2 Q. B. 353.

1890 (*f*), extended to all articles of food. These provisions enable the medical officer of health or inspector of nuisances to enter any premises, and inspect anything exposed for sale or deposited for the purpose of sale or preparation for sale, and intended for human food. If the article appear on inspection to be unsound or unwholesome, he may seize it and convey it before a justice to be condemned; and the person to whom it belonged, or on whose premises it was found, is liable to penalties.

The provisions of the Public Health Act, 1875, relating to infectious diseases, have been greatly extended and amended by later Acts—the Epidemic and other Diseases Prevention Act, 1883 (*g*), the Public Health (Ships) Act, 1885 (*h*), the Infectious Diseases (Prevention) Act, 1890 (*i*), and the Public Health (Ports) Act, 1896 (*k*). Another important Act is the Infectious Disease (Notification) Act, 1889 (*l*), originally an adoptive Act, but now made compulsory by the Infectious Disease (Notification) Extension Act, 1899 (*m*). It requires the head of the family to which belongs any person suffering from a dangerous infectious disease, and every medical practitioner attending such person, to notify the fact to the medical officer of health for the district. The medical practitioner receives a fee for each notification. The diseases to which the Act applies include small-pox, cholera, diphtheria, membranous croup, erysipelas, scarlet fever, typhus, typhoid, enteric, relapsing, continued, or puerperal fever, and any other disease to which the Act may be extended by order of the council with the approval of the Local Government Board. The information thus obtained enables a district council to a large extent to check the spread of disease by means of the exercise of their general powers, of which only a few can here be mentioned. The council may require a house to be

(*f*) 53 & 54 Vict. c. 59, s. 28.
(*g*) 46 & 47 Vict. c. 59.
(*h*) 48 & 49 Vict. c. 35.
(*i*) 53 & 54 Vict. c. 34.
(*k*) 59 & 60 Vict. c. 20.
(*l*) 52 & 53 Vict. c. 72.
(*m*) 62 & 63 Vict. c. 8.

properly disinfected. They may provide a suitable place and apparatus for the disinfection of clothes, bedding, etc., and may require such clothing or bedding to be brought for disinfection, or destroyed when necessary. They can provide ambulances, and may procure a justices' order for the removal to a hospital of any person suffering from infectious disease who has no proper lodging or accommodation (*n*), or who is on board any ship or vessel, or is in a canal boat (*o*). They may prevent the removal of a dead body from a hospital or mortuary except for burial, and require the burial of dead bodies remaining unburied in rooms occupied by living persons. And they may provide temporary shelter for persons who have been compelled to leave a house in order that it may be disinfected. The district council may cause dairies to be inspected with a view to the preventing of the spread of disease by means of milk. And they can enforce various sections of the statutes which forbid such acts as the exposing of infected persons in streets and public places; the selling or exposure of infected clothing, rags, or other articles; the use of public conveyances by infected persons without notice, and the subsequent use of such vehicles without disinfection; the letting of houses or apartments which have been infected until they have been properly disinfected; the throwing of infectious rubbish into ashpits, etc. Many of these provisions are applied to ships by the Public Health (Ships) Acts, 1885 (*p*). Under the Contagious Diseases (Animals) Act, 1886 (*q*), district councils have important powers for the registration, inspection, and regulation of dairies, cowsheds, and milk-shops.

District councils have power to provide hospital accommodation for sick persons in their district, and they may do so by entering into contracts for the use of a hospital

(*n*) *Warwick* v. *Graham*, [1899] 2 Q. B. 191.

(*o*) Canal Boats Act, 1877, s. 4.

(*p*) 48 & 49 Vict. c. 35.

(*q*) 49 & 50 Vict. c. 32.

or the reception of patients into a hospital, or by the building of a hospital; but in the case last mentioned they must not build or use the hospital so as to be a nuisance (*r*). District councils may also provide mortuaries; and cemeteries under the Public Health (Interments) Act, 1879 (*s*).

Elsewhere in this work it has been stated, that both in urban and rural districts the councils act as surveyors of highways (*t*). Their powers and duties as such are only remotely connected with the sanitary condition of the people, and may be passed by with this mere mention. But urban councils have powers and duties connected with streets which bear more directly on the subject of this chapter. First among these is the power of making up, that is to say, sewering, levelling, paving, channelling and lighting such streets as are not highways repairable by the inhabitants at large. Such streets are of two kinds, (1) those which have never been dedicated to public use (*u*), and (2) those streets which have been dedicated to public use as highways since 1835, but have never become repairable by the highway authority by reason of non-compliance with the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 23 (*x*). Under the Public Heath Act, 1875, s. 150, notice has to be given to the persons whose property abuts on the street, to do the necessary works; in their default, the council execute the works and recover the expenses from the owners in proportion to their respective frontages. An alternative procedure is pro-

(*r*) *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Ca. 193.

(*s*) 42 & 43 Vict. c. 31.

(*t*) See *ante*, pp. 57, 58.

(*u*) *Taylor* v. *The Corporation of Oldham*, *per* Jessel, M.R. (1876), 4 Ch. D. 395, 407.

(*x*) *Roberts* v. *Hunt* (1850), 15 Q. B. 17; *R.* v. *Wilson* (1852), 18 Q. B. 348; *R.* v. *Dukinfield* (1863), 32 L. J. M. C. 230; *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517; *Rishton* v. *Haslingden Corporation*, [1898] 1 Q. B. 294; *Leigh Urban District Council* v. *King*, [1901] 1 K. B. 747.

vided by the Private Street Works Act, 1892 (*y*), the principal feature of which is, that while the owners do not have the option of themselves doing the work, they are enabled to raise before justices various objections to the works, which previously could only have been raised after the works were executed and proceedings had been taken to recover the expenses. Once the works have been done, the district council may declare the street to be a highway repairable by the inhabitants at large.

An urban council have power to make new streets and widen old ones, and they can prevent the erection or bringing forward of buildings beyond the houses on either side (*z*). But perhaps their most important power is that which enables them to make and enforce by-laws with respect to new streets and buildings. These may relate to the level, width, construction, and sewerage of new streets, and to such matters as the structure of the walls, foundations, roofs and chimneys of new buildings, and the provision of proper air space and ventilation, means of drainage, sanitary conveniences, etc. By-laws may also be made for the closing of premises unfit for human habitation.

Urban councils may also acquire or accept gifts of land for public parks or recreation grounds, and make regulations for their use ; and they may, subject, however, in this case to private rights, establish and regulate markets and provide public slaughter-houses. Private slaughter-houses have to be registered, if they were in existence before the district became urban ; those established afterwards have to be licensed every year.

Reference has already been made to by-laws for certain purposes. It may be convenient to say, that they may be made for a great variety of other purposes, such as the cleansing of footways, and of closets, cesspools, ashpits, etc.,

(*y*) 55 & 56 Vict. c. 57.

(*z*) See the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict c. 52).

the removal of house refuse, the prevention of nuisances from snow, filth, dust, ashes, and rubbish, the keeping of animals, the regulation of common and other lodging-houses, the conduct of offensive trades, the management of mortuaries, public pleasure grounds, and markets, the accommodation of persons engaged in hop-picking or fruit picking (*a*), public sanitary conveniences, the removal of offensive matter through the streets, etc. All such by-laws must be confirmed by the Local Government Board, but such confirmation of itself gives them no validity. They may be invalid, though duly confirmed, if they are uncertain, unreasonable, or repugnant to the general law.

It will be observed that, while many of the powers and duties above mentioned belong to urban councils only, the Local Government Board has power to confer on a rural council all or any of such powers, by means of a simple order published in the prescribed manner.

The foregoing outline, necessarily an imperfect one, of the powers and duties of district councils, has been thus far confined to such as arise under the Public Health Acts. There are, however, various other statutes under which these councils exercise functions which relate to the sanitary condition of the people. Prominent among these are the Acts relating to the Housing of the Working Classes, 1890 and 1900 (*b*). The first of these Acts is the principal Act, and it is divided into three parts. Under the first part, provision is made for the clearing of unhealthy areas. This is effected by means of an improvement scheme which has to be embodied in a provisional order and confirmed by Parliament. The second part relates to unhealthy dwelling-houses, and provides the machinery whereby they can be closed or demolished if they are unfit for human habitation. Under the third

(*a*) Public Health Act, 1882.

(*b*) 53 & 54 Vict. c. 70; 63 & 64 Vict. c. 59.

part, district councils may provide lodging-houses for the working classes, and in the expression lodging-houses is included separate houses or cottages with or without gardens, which may not, however, exceed half-an-acre. These lodging-houses may be within or without the district of the council which provides them.

Among other statutes affecting public health which are administered by district councils, may be enumerated the following:—The Knackers Acts, 1786 and 1844 (*c*), the Baths and Washhouses Acts, 1846 to 1882 (*d*), the Public Improvements Act, 1860 (*e*), the Agricultural Gangs Act, 1867 (*f*), the Acts for the prevention of the adulteration of food, commonly called the Sale of Food and Drugs Acts, 1875, 1879 and 1899 (*g*), the Commons Acts, 1876 and 1899 (*h*), the Canal Boats Acts, 1877 and 1884 (*i*), the Alkali Works Acts, 1881 and 1892 (*k*), the Margarine Act, 1887 (*l*), the Open Spaces Acts, 1887 and 1890 (*m*), the Allotments Acts, 1887 and 1890 (*n*), the Sale of Horseflesh Regulation Act, 1889 (*o*), the Museums and Gymnasiums Act, 1891 (*p*), the Shop Hours Acts, 1892, 1893, and 1895 (*q*), the Isolation Hospitals Acts, 1893 and 1901 (*r*), the Factory and Workshop Act, 1901 (*s*).

(*c*) 26 Geo. 3, c. 71; 7 & 8 Vict. c. 87.

(*d*) 9 & 10 Vict. c. 74; 10 & 11 Vict. c. 61; 41 & 42 Vict. c. 14; 45 & 46 Vict. c. 30.

(*e*) 23 & 24 Vict. c. 30.

(*f*) 30 & 31 Vict. c. 130.

(*g*) 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30; 62 & 63 Vict. c. 51.

(*h*) 39 & 40 Vict. c. 56; 62 & 63 Vict. c. 30.

(*i*) 40 & 41 Vict. c. 60; 47 & 48 Vict. c. 75.

(*k*) 44 & 45 Vict. c. 37; 55 & 56 Vict. c. 30.

(*l*) 50 & 51 Vict. c. 29.

(*m*) 50 & 51 Vict. c. 32; 53 & 54 Vict. c. 15.

(*n*) 50 & 51 Vict. c. 48; 53 & 54 Vict. c. 65.

(*o*) 52 & 53 Vict. c. 11.

(*p*) 54 & 55 Vict. c. 22.

(*q*) 55 & 56 Vict. c. 62; 56 & 57 Vict. c. 67; 58 & 59 Vict. c. 5.

(*r*) 56 & 57 Vict. c. 68; 1 Edw. 7, c. 8.

(*s*) 1 Edw. 7, c. 22.

It is necessary to mention specially the Burial Acts. The first of these, the Act of 1852 (*t*), applied only to the metropolis. It provided for the closing of old burial grounds and churchyards, and the provision and management of new burial grounds by burials boards elected for the purpose in each parish by the inhabitants in vestry. The provisions of the Act were extended to the rest of the country by an Act of 1853 (*u*), and it has been amended by many subsequent statutes (*x*). The burial boards by whom these Acts were administered have now been largely superseded, and their powers and duties transferred, under the Local Government Act, 1894 (*y*), to the district and parish councils. Such powers and duties, however, must not be confounded with those which district councils, as such, possess under the Public Health (Interments) Act, 1879, already mentioned. In this connection may be mentioned the Cremation Act, 1902 (*z*), under which burial authorities have power to provide and regulate crematoria for the burning of human remains.

There remain still to be mentioned the sanitary Acts in force in the metropolis. These are the Metropolis Management Acts, 1855—1899 (*a*). These Acts relate, of course, to the local government of the metropolis generally, and not only to sanitary matters; but it was under the earlier of them that the main drainage of London was carried out. In addition to these Acts, and

(*t*) 15 & 16 Vict. c. 85.

(*u*) 16 & 17 Vict. c. 134.

(*x*) 17 & 18 Vict. (1854), c. 87; 18 & 19 Vict. (1855), c. 128; 20 & 21 Vict. (1857), cc. 35, 81; 22 Vict. (1859), c. 1; 23 & 24 Vict. (1860), c. 64; 25 & 26 Vict. (1862), c. 100; 34 & 35 Vict. (1871), c. 33; 43 & 44 Vict. (1880), c. 41; 44 & 45 Vict. (1881), c. 2; 48 & 49 Vict. (1885), c. 21; 63 & 64 Vict. (1900), c. 15.

(*y*) 56 & 57 Vict. c. 73.

(*z*) 2 Edw. 7, c. 8.

(*a*) 18 & 19 Vict. (1855), c. 120; 19 & 20 Vict. (1856), c. 112; 21 & 22 Vict. (1858), c. 104; 25 & 26 Vict. (1862), c. 102; 41 & 42 Vict. (1878), c. 32; 48 & 49 Vict. (1885), c. 33; 50 & 51 Vict. (1887), c. 17; 53 & 54 Vict. (1890), cc. 54, 66; 56 & 57 Vict. (1893), c. 55; 62 & 63 Vict. (1899), c. 15.

more especially dealing with sanitary matters, is the Public Health (London) Act, 1891 (*b*), which consolidated for the metropolis all the earlier legislation in the same way, and very much on the same lines, as was done by the Public Health Act, 1875, for the rest of the country. It has been amended by the Public Health (London) Acts, 1893 and 1896 (*c*).

(*b*) 54 & 55 Vict. c. 76.

(*c*) 56 & 57 Vict. c. 47, and 59 & 60 Vict. c. 19.

CHAPTER VI.

OF THE LAWS RELATING TO THE POOR.

[By the common law, as appears from the Mirrour (*a*), the poor were to be "sustained by parsons (rectors of the "church) and the parishioners, so that none of them "should die for default of sustenance"; but no compulsory method for their relief or sustenance was provided until the reign of Henry the Eighth. The monasteries undoubtedly supported a very numerous and idle poor, by a daily distribution of alms at their gates; and upon their dissolution, divers statutes were made, in the reigns of King Henry the Eighth and his children, for providing for the poor and impotent, who, as the preambles to some of them recite, had of late years greatly increased.

These poor were principally of two sorts: the sick and impotent, and therefore *unable* to work; the idle and sturdy, who, although able, were *not willing* to work. To provide, in some measure, for both of these, in and about the metropolis, Edward the Sixth founded three royal hospitals; Christ's and St. Thomas' for the relief of the impotent, and Bridewell for the punishment and employment of the vigorous and idle. Ultimately, after many other experiments, which were more or less effective, by the Poor Relief Act, 1601 (which is generally considered as the foundation of the modern poor law), *overseers* of the poor were appointed in every parish;] and it was provided, that the churchwardens of every parish should be the overseers, and that there should likewise be appointed as overseers two, three, or four, but not more, of the

(*a*) Ch. 1, s. 3.

inhabitants, being substantial householders, to be nominated yearly by two justices dwelling in or near the parish.

This Act of Elizabeth involved two principles; first, that every poor person should be either relieved, or provided with work, and, secondly, that this should be done *parochially*, that is, out of funds to be raised and applied by parish officers within the limits of their respective parishes. It is to be understood, however, that it was not the policy of the law, to allow paupers to resort for relief indiscriminately to any parish they might prefer: for, by certain statutes of a date anterior to the Act of Elizabeth, persons unable or unwilling to work were compellable to remain in the particular parishes where they were *settled* (*b*). And soon after the Restoration this policy was extended; for by the Poor Relief Act, 1662, s. 1, it was enacted, that persons newly coming to settle in any parish, and likely to become chargeable, might be removed by the warrant of two justices of the peace, on complaint of the parochial officers, to the parish where they were last legally settled. But inasmuch as the Act subjected the poor to removal from every place in which they were not settled to the place where they were settled, it had the indirect effect of attaching to a settlement the quality of a *right*, to wit, an exemption from removal; and persons, who for any reason were desirous of gaining a settlement-right in particular parishes, were found to resort to them furtively, with the view of completing the forty days' residence therein, required by the last mentioned Act, before they were discovered (*c*). To prevent this abuse, provision was afterwards made, that the forty days should be computed, only from the period when notice in writing of the new comer's abode was given to the parish officers, except in cases where the residence was attended with

(*b*) 19 Hen. 7 (1503), c. 12; 1 Edw. 6 (1547), c. 3; 3 & 4 Edw. 6 (1550), c. 16; 14 Eliz. (1572), c. 5.

(*c*) 1 Bl. Com. 362.

certain circumstances of notoriety, such as entering into a yearly service, or an apprenticeship (*d*); and although at a subsequent period the requisite of notice was abandoned (*e*), the requisite of notoriety remained. However in the reign of George the Third (*f*) the legislature provided that a man coming to settle in a parish should not be liable to removal, upon the mere *probability* of becoming chargeable, but must actually have become chargeable by receiving or applying for relief in order to become removable. In the meantime it had become an established rule that settlement was a right which might be claimed *derivatively*, the child being entitled to the parent's settlement, and the wife to that of her husband.

In the same reign, impressed by the growth of pauperism, the legislature made some attempts to improve the poor law system, and the administration of *poor relief*. By the 22 Geo. III. (1782), c. 83,—commonly called Gilbert's Act (*g*),—any parish was authorised, by consent of two third parts in number and value of the owners or occupiers, and with the approbation of two justices, to appoint *guardians* to act in lieu of overseers, in all matters relative to the relief and management of the poor, and also to enter into a voluntary union with one or more other parishes, for the more convenient accommodation, maintenance, and employment of their paupers in common; and by the Poor Relief Act, 1819, any parish, in vestry assembled, was enabled to commit the management of its poor to a committee of the parishioners called a *select vestry*, to whose orders the overseers were to conform (*h*). But these measures, though pointing in the right direction, were not effective; nor, indeed, were they generally

(*d*) 1 Bl. Com. 362; 3 W. & M. (1691), c. 11.

(*e*) Poor Removal Act, 1795, s. 3.

(*f*) *Ibid.* s. 1.

(*g*) Repealed by the Statute Law Revision Act, 1871.

(*h*) The Poor Relief Act, 1819, so far as it empowered parishes to establish select vestries for the concerns of the poor, was repealed by the Statute Law Revision Act, 1873.

adopted. During, and after, the Napoleonic wars, pauperism continued to increase; and its evils were aggravated by mal-administration of the poor laws, and by the inherent defects of poor law organisation. The size of most parishes was so limited as to expose them to great disadvantages, both with regard to the employment and to the relief of their poor, the difficulty and expense of which may both obviously be reduced, when the field of operation is wider, and provision can be made on a larger scale. These considerations induced parliament, in the year 1833, to issue a royal commission, to inquire into and report on the laws relating to the poor; and in the following year, and upon the basis of the report of the commissioners, was passed the Poor Law Amendment Act, 1834, which, amended and supplemented by a number of statutes specified below (*i*), and, in regard to poor law

(*i*) 5 & 6 Will. 4, c. 69 (Union and Parish Property Act, 1835); 2 & 3 Vict. c. 84 (Poor Rates Act, 1839); 5 & 6 Vict. c. 18 (Parish Property and Parish Debts Act, 1842); The Poor Law Amendment Acts of 1842, 1844, 1848, 1849, 1850, 1851, 1866 and 1868; The Poor Removal Acts of 1845, 1846, 1847, 1848, 1861 (two), 1862 and 1863; 10 & 11 Vict. c. 109 (Poor Law Board Act, 1847); 11 & 12 Vict. c. 31 (Poor Law Procedure Act, 1848); c. 82; c. 91 (Poor Law Audit Act, 1848); c. 111; 12 & 13 Vict. c. 13 (Poor Relief Act, 1849); 20 Vict. c. 19 (Extra-parochial Places Act, 1857); 22 & 23 Vict. c. 49 (Poor Law (Payment of Debts) Act, 1859); 25 & 26 Vict. c. 103 (Union Assessment Committee Act, 1862); 28 & 29 Vict. c. 79 (Union Chargeability Act, 1865); 32 & 33 Vict. c. 41 (Poor Rate Assessment and Collection Act, 1869), amended by 42 & 43 Vict. c. 10 (Assessed Rates Act, 1879); 32 & 33 Vict. c. 45 (Union Loans Act, 1869), amended by 42 & 43 Vict. (1878), c. 54, s. 13; 33 & 34 Vict. c. 2 (Dissolved Boards of Management and Guardians Act, 1870); c. 48 (Paupers Conveyance Expenses Act, 1870); 34 & 35 Vict. c. 11 (Poor Law Loans Act, 1871); c. 70 (Local Government Board Act, 1871); c. 108 (Pauper Inmates Discharge and Regulation Act, 1871); 35 & 36 Vict. c. 2 (Poor Law Loans Act, 1872); 39 & 40 Vict. c. 61 (Divided Parishes and Poor Law Amendment Act, 1876, amended by 42 & 43 Vict. (1879), c. 12); 42 & 43 Vict. c. 6 (District Auditors Act, 1879); c. 54 (Poor Law Act, 1879); 45 & 46 Vict. c. 20 (Poor Rate Assessment Act, 1882); c. 58 (Divided

authorities and areas by the Local Government Acts of 1888 and 1894, is still the foundation of the existing system of poor law relief.

By the Act of 1834, the general management of the poor, and of the funds for their relief, throughout the country, was placed for a limited period under the superintendence and control of a body of Poor Law Commissioners; who had power to make regulations for the guidance of the different parochial authorities in carrying out the poor law statutes. The commissioners were aided in their operations by a certain number of assistant commissioners. This commission was superseded in the year 1847; and all its powers and duties were transferred to the Poor Law Board (*k*). In 1871 this Board again was replaced by the Local Government Board, (established by the Local Government Board Act,) which consists of a president, a responsible minister of the Crown, holding office during pleasure (*l*), together with (as *ex officio* members) the lord president of the privy council, all the secretaries of state, the lord privy seal, and the chancellor of the exchequer. All *general poor law rules*—a term which extends to all rules intended to affect more than one union (*m*)—must be under the seal of this

Parishes and Poor Law Amendment Act, 1882); c. 80; 46 & 47 Vict. c. 11 (Poor Law Conferences Act, 1883); 48 & 49 Vict. c. 22 (Public Health and Local Government Conferences Act, 1885); c. 46 (Medical Relief Disqualification Removal Act, 1885); 59 & 60 Vict. c. 50 (Poor Law Officers Superannuation Act, 1896), amended by the 60 & 61 Vict. c. 28; 61 & 62 Vict. c. 19 (Poor Law Unions Association, Expenses, Act, 1898); 62 & 63 Vict. c. 37 (Poor Law Act, 1899); 63 & 64 Vict. c. 23 (Poor Removal Act, 1900). Certain special Acts have been passed for the administration of poor relief in London: namely, the Metropolitan Poor Act of 1867, with the amending Acts 32 & 33 Vict. (1869), c. 63, 33 & 34 Vict. (1870), c. 18, 34 Vict. (1870), c. 15, 60 & 61 Vict. (1897), c. 29, 61 & 62 Vict. (1898), c. 45.

(*k*) Poor Law Board Act, 1847, s. 10; Poor Law Amendment Act, 1867.

(*l*) Only the *president* and *one* of the Board's secretaries may sit in the House of Commons at the same time (s. 4).

(*m*) Act of 1847, s. 15.

Board, and signed by the president or one of the *ex officio* members of the Board, and countersigned by a secretary or assistant-secretary; and any such rules may be disallowed by his Majesty in council (*n*), or their validity may be questioned in the King's Bench Division (*o*). Once in every year the Board submits to parliament a general report of its proceedings (*p*).

The Board was empowered to direct, that the relief of the poor in any parish should be administered by a board of guardians, to be elected by the owners of property and ratepayers in that parish, in such manner as in the Poor Law Acts set forth (*q*). The system of election, however, has been assimilated by the Local Government Act of 1894 to that of more democratic bodies. In the rural parts of unions the guardians are identical with the rural district councillors; in urban and municipal districts they are still specially elected. Poor law inspectors were appointed for the purpose of visiting workhouses, and of being present at meetings of guardians, or other local meetings held for the relief of the poor (*r*); and the superintendence of the board was extended to poor persons lodged and maintained by contract, in any establishment not being a lunatic asylum or workhouse nor under the effective control of any parochial or other local authority (*s*). Moreover, no parishes were for the future to be united, under Gilbert's Act, without the previous consent of the Board; but the Board might at its discretion consolidate two or more parishes into one *union*, under the government of a single board of guardians, to be elected by the owners and ratepayers of the component parishes (*t*). The county justices resident in the union or parish were at

(*n*) Act of 1847, s. 17.

(*o*) Act of 1834, s. 105; Act of 1849, s. 13; *R.* v. *Oldham Union* (1847), 10 Q. B. 700.

(*p*) Act of 1847, s. 13.

(*q*) Act of 1834, ss. 39, 40. For the reformed system, see Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*r*) Act of 1847, ss. 18, 20.

(*s*) Act of 1849.

(*t*) Act of 1834, s. 38.

first made *ex officio* guardians, and so continued until 1894, when all *ex officio* guardians were abolished by the Local Government Act of that year. Each of such "unions" was to have a common workhouse, provided and maintained at the common expense of the component parishes; and also a *common fund*, to which each component parish was to contribute (*u*). On this fund was charged (by the Union Chargeability Act, 1865, s. 1) all the cost of the relief of the union poor, as well as certain other expenses incurred by the union board of guardians (*x*); and by the Poor Law Act, 1879, s. 8, provision was made for the combination of unions in certain cases (*y*). As regards the relief of the destitute poor *in the metropolis*, the cost thereof was distributed among the several unions, parishes, and places therein, under the superintendence of the Local Government Board (*z*). The provisions above summarized are (roughly speaking) the provisions now in force, with only such variations as have been introduced therein by the Local Government Acts, 1884 and 1894, of which some notice was taken in the preceding chapter, and which, so far as they relate to the poor law, will be again referred to at the end of this present chapter.

The poor law system, as at present established, is in great need of consolidation, being contained in over two hundred Acts of Parliament. It will be most conveniently

(*u*) Poor Removal Act, 1861, ss. 9–11; Act of 1865, s. 12; Act of 1867, s. 15.

(*x*) The other expenses referred to comprise the relief of destitute wayfarers (11 & 12 Vict. (1848), c. 110, s. 10; 12 & 13 Vict. (1849), c. 103, s. 2; 24 & 25 Vict. (1861), c. 55, s. 4); the burial of workhouse paupers (13 & 14 Vict. (1850), c. 101; 28 & 29 Vict. (1865), c. 79, s. 1); the relief of persons temporarily disabled by accident or sickness (11 & 12 Vict. (1848), c. 110, s. 2); the costs of pauper lunatics (53 Vict. (1890), c. 5); and vaccination and registration expenses (28 & 29 Vict. (1865), c. 79, s. 1).

(*y*) On one occasion of great distress in the counties of Lancaster, Chester, and Derby, the poor law authorities were, by a temporary Act (25 & 26 Vict. (1862), c. 110), enabled to call on the unions of the county at large to contribute to the relief required in particular unions.

(*z*) Act of 1867, c. 6; Local Government Board Act, 1871.

dealt with, if we consider it, first, in connection with the settlement of the poor; and second, in connection with the administration of poor law relief, and the assessment and collection of the poor rate.

1. *Poor Law Settlements.*—A settlement may be acquired by birth, or by parentage, or by marriage, or by renting a tenement, or by being bound apprentice and inhabiting, or by estate, or by payment of taxes, or by residence. (1.) By *birth*,—for wherever a child is first known to be, that is always *primâ facie*, and until some other can be shown, the place of its settlement (*a*); but if its parents can be proved to have acquired a settlement, either by birth or otherwise, in another parish, then the *primâ facie* settlement of the child will be superseded by a derivative one, viz., the settlement by parentage (*b*). (2.) By *parentage*,—for a legitimate child takes the last settlement of its father, or of its widowed mother (as the case may be), till it attains the age of sixteen, and retains such settlement until it acquires another; and a bastard child now retains the settlement of his mother until he gains another for himself (*c*). (3.) By *marriage*,—for a female may claim the settlement which belongs to her husband, and she retains that settlement after his death (*d*). But if her husband has no settlement, or if his settlement is unknown, she retains that which belonged to her before her own marriage; and she cannot acquire one, in her own right, during the marriage (*e*). (4.) By *renting a tenement;* and for this it is requisite, that the tenement shall be a separate and distinct tenement, and that the party shall have *bonâ fide* rented the same at and for the

(*a*) *R.* v. *All Saints, Derby* (1849), 14 Q. B. 219

(*b*) *Edmonton Union* v. *St. Mary, Islington* (1885), 15 Q. B. D. 95; *Reigate Union* v. *Croydon Union* (1889), 14 App. Ca. 465.

(*c*) Act of 1867, s. 35; *R.* v. *Bridgnorth Guardians* (1882—3), 9 Q. B. D. 765; 11 Q. B. D. 314.

(*d*) Act of 1867, s. 35.

(*e*) *Medway Union* v. *Bedminster Union* (1889), 14 App. Ca. 465.

sum of 10*l.* a year at the least for the term of one whole year. He must also have occupied the tenement and paid the rent for the term of one whole year at the least, and must (for the same period) have been assessed to and have paid the poor rate in respect thereof, and must have resided in the parish or township for forty days (*f*). (5.) By being *bound apprentice*, and *inhabiting* for forty days under such binding, the apprentice gains a settlement in the parish in which he inhabits, which need not necessarily be the parish in which the service takes place (*g*); but no settlement can be acquired by being apprenticed to the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise (*h*). And the indenture of apprenticeship must in all cases have been executed by the apprentice, except in the case of one bound by the parish (*i*). (6.) By *estate*, for a settlement is gained, of a temporary kind, in any parish, by having *an estate of one's own* there, of whatever value, and whether the interest be legal or equitable (*k*), combined with a residence in the parish for forty days (*l*), a species of settlement which appears to be founded on the principle of the common law, that a man shall not be removed from his own property (*m*). But no person may retain a settlement so gained for any longer time than he inhabits within ten miles of the parish (*n*); and in case he ceases to inhabit within that distance, and afterwards becomes chargeable, he is liable to be removed to the parish in which he was settled previously to such inhabitancy, or else to the parish (if any) in which he has

(*f*) Poor Relief (Settlement) Act, 1825, s. 2; Act of 1831, s. 1; Poor Law Amendment Act, 1834, s. 66.

(*g*) *Rex* v. *Brotton* (1820), 4 B. & Ald. 84.

(*h*) Act of 1834, s. 67.

(*i*) *Ibid.* s. 15; Act of 1844, s. 12; and the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 106, 107.

(*k*) *R.* v. *Ardleigh* (1837), 7 A. & E. 70.

(*l*) *Ryslip* v. *Harrow* (1699), 2 Salk. 524.

(*m*) 2 Nolan, 58.

(*n*) *R.* v. *Saffron Walden* (1846), 9 Q. B. 76.

gained a settlement since the inhabitancy (*o*). (7.) By *payment of parochial taxes*,—for a settlement may be gained by being *charged to and paying the public taxes, and levies of the parish* (*p*),—provided (by the Poor Removal Act, 1795, s. 4), the tenement assessed is of the yearly value of 10*l*., and provided (by the Poor Relief (Settlement) Act, 1825, s. 2) the tenement (not being the person's own property) is a separate and distinct tenement, *bonâ fide* rented by him for 10*l*. a year at the least, for the term of one whole year, and occupied for a year at least (*q*). Last and most important of all, (8.) By *residence*,—for a settlement may also be acquired by *residing for the term of three years in a parish* in such manner and under such circumstances in each of such years as would render him *irremovable* (*r*). A settlement so acquired is to be distinguished from the status of irremovability, upon which we shall speak later.

When, by any of the modes above enumerated, a person has gained a settlement in any parish, he is considered as settled there until he acquires a new one in some other place ; but a later acquisition supersedes an earlier. And all those who stand in need of relief, and apply for it, are entitled to be relieved in the parish (or union) in which they happen to be, or to which, as it is commonly expressed, they are *chargeable ;* for if settled there, they constitute its *settled* poor, and if not settled there, they are termed its *casual* poor (*s*). The parish is, however, exonerated from this burthen, if there is anyone competent and by law compellable to maintain the pauper ;

(*o*) Act of 1834, s. 68 ; *R.* v. *St. Giles-in the-Fields* (1842), 2 Q. B. 446 ; *R.* v. *Hendon* (1842), 2 Q. B. 455.

(*p*) Poor Relief Act, 1691, s. 6 ; Poor Relief (Settlement) Act, 1825, s. 2 ; Act of 1831, s. 1 ; Act of 1834, s. 66 ; *St. George's, Hanover Square* v. *Cambridge Union* (1867), L. R. 3 Q. B. 1.

(*q*) *St. George's, Hanover Square* v. *Cambridge Union, ubi sup.*

(*r*) Divided Parishes Act, 1876, s. 34 ; *St. Olave's Union* v. *Canterbury Union*, [1897] 1 Q. B. 682.

(*s*) *R.* v. *St. Pancras* (1838), 7 A. & E., at p. 754.

and those who are so compellable comprise the wife and husband, the father and grandfather, the mother and grandmother, or the legitimate (*t*) children of the pauper (*u*), a husband being also liable by the Poor Law Amendment Act, 1834, ss. 56, 57, to maintain his wife's children born before his marriage with her, until the children attain sixteen years of age, or their mother dies sooner. The measure or extent of this liability is prescribed by an order of the justices at their general quarter or petty sessions (*x*): and on refusal to obey such order, the sums so assessed are recoverable before a court of summary jurisdiction as a civil debt, *i.e.*, they may be levied by distress and sale of the goods and chattels of the person liable. And in default of distress, if it be proved that such person had means to pay since the order, and has not paid, he may be committed to prison for contempt (*y*). As a further safeguard, it is provided by the Poor Relief Act, 1718, that where any person shall run away from his place of abode, leaving his wife or children chargeable as paupers, his goods, or any annual profits of his lands, may be seized under the warrant or order of two justices, and (if such warrant or order be confirmed by the sessions) may be applied towards the maintenance of such wife or children: and it is further provided, by the Vagrancy Act, 1824, s. 4, that persons running away and leaving their wives or children so chargeable, shall be deemed *rogues and vagabonds*, and shall be liable to imprisonment for any time not exceeding three calendar months. By section 3 of the same Act, persons wholly or in part able to maintain themselves or families by work or other means, but refusing or neglecting so to do,

(*t*) *City of Westminster* v. *Gerrard* (1631), 2 Bulst. 346.

(*u*) Poor Relief Act, 1601, s. 7; Poor Law Amendment Act, 1867, ss. 33, 36; Married Women's Property Acts, 1870, s. 13; and 1882, s. 21.

(*x*) Poor Relief Act, 1819, s. 26.

(*y*) Act of 1868, s. 36; Summary Jurisdiction Act, 1879, ss. 6, 35.

whereby they become so chargeable, shall be deemed *idle and disorderly persons*, and may be summarily convicted, and imprisoned in the house of correction with hard labour, for any time not exceeding one calendar month (*z*).

If there are no relations to whom recourse can be had, the *settled poor* must be relieved by the poor-law authorities of the union or parish, so long as their necessity continues; but, if they are able to work and refuse to do so, they may be committed to prison (*a*). The *casual poor* on the other hand may, in general, be *removed*, and are entitled to relief only till such removal can be effected, and are in the meantime subject to the provisions of the Pauper Lunatics Discharge and Regulation Act, 1871, and the Casual Poor Act, 1882, which regulate their treatment in the casual wards and in the workhouses of the parish or union. Moreover, all casuals born in Scotland or Ireland, the Isle of Man, Scilly, Jersey, or Guernsey, who have no settlement in England, may, upon complaint of any guardian, relieving officer, or overseer, be removed by the order and warrant of two justices of the peace, or (in a proper case) of a stipendiary or metropolitan police magistrate (*b*), to the place of their birth, together with their families ; and casuals who have a known place of settlement in England (wherever born) may be removed, by the like order and warrant, to the place of such settlement, together with their families (*c*). The removal order is in either case obtained, upon complaint of the parish (or union) to which the paupers have become chargeable (*d*), the chargeability

(*z*) *Reere* v. *Yates* (1862), 1 H. & C. 435 ; *Horley* v. *Rogers* (1860), 2 El. & El. 674. Only *male* persons are intended (see *Peters* v. *Corrie* (1877), 2 Q. B. D. 131).

(*a*) Act of 1601, s. 4 ; Act of 1815, s. 5 ; Act of 1844, ss. 57, 58.

(*b*) Poor Removal Acts, 1845 ; 1861, c. 76 ; 1862 ; 1863.

(*c*) Poor Removal Act, 1846 ; Poor Law Procedure Act, 1848 ; Poor Law Amendment Acts, 1849, s. 3 ; 1851, s. 13 ; Poor Removal Act, 1861, s. 2 ; Union Chargeability Act, 1865 ; Poor Removal Act, 1870 ; Poor Law Act, 1899.

(*d*) Poor Relief Act, 1662, s. 1 ; Union Chargeability Act, 1865, s. 2.

being proved by the certificate of the guardians (*e*); but notice in writing of the order, accompanied by a statement in writing of the ground of the removal, must be sent to the parish (or union) on which it is made (*f*). If the order is submitted to, or if no notice of appeal is given within twenty-one days, the pauper is to be removed accordingly; but if such notice is given within that period, the pauper is to be kept where he has become chargeable, until the appeal (if duly prosecuted) shall have been determined (*g*). The appeal is to the court of quarter sessions having jurisdiction in the place from which the removal is directed (*h*); and the court may order the parish (or union) against which the appeal shall be decided to pay reasonable costs to the other (*i*), and where the respondents succeed, such costs will include the relief and maintenance of the pauper from the time of the notice of the order of removal (*k*). In the event of some doubtful point of law arising, the justices may make their order on the appeal subject to a *special case;* or the parties, at any time after notice of appeal has been given, by consent, and by order of a judge of the High Court, may state the facts in a special case, for the opinion of the High Court, and agree to have judgment entered at the sessions in conformity with the opinion of the High Court (*l*). Also, if the party decided against is dissatisfied with the order made at sessions, a writ of *certiorari* may be issued in certain cases from the King's Bench Division to remove the proceedings into the High Court; and the case is then argued there, and the order of sessions is then

(*e*) Poor Law Amendment Act, 1844, s. 69, and Act of 1848, s. 11.

(*f*) Act of 1834, s. 79; Act of 1848, ss. 2, 3, 4.

(*g*) Act of 1834, ss. 79, 80, 81, 83.

(*h*) Act of 1662, s. 2; Poor Removal Acts, 1697, s. 6, and 1848.

(*i*) Act of 1834, s. 82; Poor Law Procedure Act, 1848, s. 5; Quarter Sessions Act, 1849, ss. 4, 5.

(*k*) Act of 1834, c. 76, s. 84.

(*l*) Quarter Sessions Act, 1849, s. 11.

either affirmed or quashed, according to the law on the facts given in evidence at the sessions (*m*).

If a casual has no known place of settlement in England, and was not born in Scotland, Ireland, or other part of the United Kingdom, then he must remain of necessity in the place where he has become chargeable ; and he may claim relief there, so long as he continues to be in want, upon the same footing with its settled poor, unless and until some place be afterwards discovered wherein he may claim a settlement. There are also some particular cases in which the removal of a casual pauper to his or her place of settlement or birth is illegal ; for the wife of such a pauper cannot, if her husband has no settlement, be removed to her place of maiden settlement, so as to separate her from her husband, unless by mutual consent (*n*), nor can a child (whether legitimate or otherwise) be taken away from its mother during its time of nurture, that is, until the age of seven years. And even though an order of removal be duly made, still if the pauper, by reason of sickness or infirmity, is not in a fit state to travel, the execution of the order must be suspended, till the justices are satisfied that it may be safely executed (*o*), such suspension extending also to any others of the pauper's family included in the removal order (*p*). Also, persons in legal custody cannot be removed, under the poor laws, from the parish where they are confined. It is of particular importance to remember, that, in general, no person may now be removed from a parish (or union) in which he has resided for *one whole year* (*q*), next before

(*m*) Poor Law Procedure Act, 1848, s. 7.

(*n*) *R.* v. *Eltham* (1804), 5 East, 113 ; *Re Ethel Brown* (1884), 13 Q. B. D. 614.

(*o*) Poor Removal Act, 1795, s. 2 ; Poor (Settlement and Removal) Act, 1809, s. 3 ; *R.* v. *Llandlechid* (1860), 2 El. & El. 530.

(*p*) Act of 1809, s. 3.

(*q*) Union Chargeability Act, 1865, s. 8 ; *cf. Machynlleth* v. *Pool* (1869), L. R. 4 Q. B. 592 ; *R.* v. *St. Olave's* (1873), L. R. 9 Q. B. 38.

the application for a warrant for his removal, such period of residence sufficing to ensure his irremovability, although it should not confer on him a settlement (*r*). This is called a *status of irremovability*. Further, a pauper may not be removed for becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices shall state in the warrant that they are satisfied that the sickness or accident will produce permanent disability (*s*); and a woman residing with her husband at the time of his death cannot be removed till twelve calendar months afterwards, if she shall so long continue his widow (*t*), nor a woman deserted by her husband, if after the desertion she reside for one year in such a manner as would, if she were a widow, render her irremovable (*u*). And a child under the age of sixteen, whether legitimate or illegitimate, residing with his or her father or mother, stepfather or stepmother, or reputed father, may not be removed, unless the person with whom such child is residing may lawfully be removed (*x*).

II. *As regards the Administration of the Poor Law, and the Assessment and Collection of the Poor Rate.*—The duty of administering *relief*, where a parish is under the government of guardians, or of a select vestry, belongs to those

(*r*) By the Poor Removal Act, 1846, s. 1, any time passed in prison, or in military or naval service, or as an in-pensioner in Greenwich or Chelsea Hospitals, or in confinement in a lunatic asylum, or as patient in a hospital, or during which parochial relief shall have been received, is to be excluded from the computation; and so also the time during which any person is detained under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19, s. 32), or in a school under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118, s. 31), must be excluded from such computation.

(*s*) Poor Removal Act, 1846, s. 4.

(*t*) *Ibid.* s. 2.

(*u*) Poor Removal Act, 1861, s. 3; *R.* v. *St. Mary, Islington* (1870), L. R. 5 Q. B. 445; *R.* v. *St. George's-in-the-East* (1870), L. R. 5 Q. B. 364; *R.* v. *Cookham* (1882), 9 Q. B. D. 522.

(*x*) Poor Removal Acts, 1846, s. 3; 1861, s. 2; *R.* v. *St. Mary Arches, Exeter* (1862), 1 B. & S. 890; *Mitford Union* v. *Wayland Union* (1890), 25 Q. B. D. 164.

authorities, according to the provisions of the Acts under which they have been respectively appointed, and subject to the superintendence of the Local Government Board. Liverpool, however, is the only place where the poor law is now administered by a select vestry; fifteen other parishes or places are, for poor law purposes, managed by authorities established under local Acts (*y*); and all other parishes are now managed by separate boards of guardians, or else form part of some union managed by a board of guardians for the union. Also, with some very rare exceptions, there are now no extra-parochial places for civil purposes; for all places which before 1857 were extra-parochial were to be deemed parishes of themselves for civil purposes, and power was given to appoint overseers for such places (*z*), and all such places for which in 1868 no overseer had been appointed, or for which no overseer was then acting, were for all civil parochial purposes incorporated with the next adjoining parish (*a*).

In all cases of *sudden and urgent necessity* arising in a parish under the government of guardians or of a select vestry, any overseer is empowered and required by law, whether the applicant for relief is settled in the parish or not, to give him or her such necessary temporary relief as the case may require; and if the overseer refuses to give such necessary relief, and the pauper is not settled or usually resident in the parish to which the overseer belongs, any justice of the peace may, by an order under his hand or seal, direct such necessary relief to be given, the overseer who disobeys such order incurring a penalty not exceeding 5*l*. (*b*). And whatever may be the settle-

(*y*) Act of 1844, ss. 64, 65; Poor Law Audit Act, 1848, s. 12; and Poor Law Amendment Act, 1867, s. 2.

(*z*) 20 Vict. (1857), c. 17, s. 1.

(*a*) Poor Law Amendment Act, 1868, s. 27.

(*b*) Act of 1834, s. 54; and see *Att.-Gen.* v. *Merthyr Tydfil*, W. N. (1899) 38, for the powers of guardians to grant relief to able-bodied persons in cases of sudden or urgent necessity.

ment or residence of the pauper, any justice of the peace is empowered to order *medical* relief in all cases of sudden and dangerous illness, the overseer here also being subject to the penalty of 5*l*., in case of disobedience (*c*). Also, in unions formed under the Poor Law Amendment Acts, any two justices of the peace usually acting for the district may, at their discretion, order any adult person, who is unable to work and is entitled to relief, to be relieved, if he desires it, without residing in the workhouse; but in such a case, one of the justices must certify, of his own knowledge, that the person is unable to work (*d*). And it is now made lawful for the guardians to permit, at their discretion, a husband and wife admitted into a workhouse to live together, provided either of them shall be infirm, sick, or disabled by any injury, or shall be above the age of sixty years; but every such case must be reported forthwith to the Local Government Board (*e*).

The duty of making and levying the poor rate or parochial fund for the relief of the poor belonged, and, subject (as regards rural parishes) to the provisions of the Local Government Act, 1894, still belongs, to the churchwardens and overseers of the parish: and the concurrence of the inhabitants at large was not, and is not, necessary (*f*). For the better execution of these duties, the statutes authorize the appointment of *collectors and assistant overseers* for the parish or (it may be) for the separate townships therein (*g*). And here it is convenient to observe, that the office of overseer is, in general, compulsory, excepting in the cases of the persons enumerated in the foot-note below (*h*): and a woman may fill the

(*c*) *Rex* v. *Kece* (1793), 5 T. R. 159.

(*d*) Act of 1834, s. 27; Act of 1848, s. 12; Poor Relief Act, 1894.

(*e*) Act of 1847, s. 23; Divided Parishes Act, 1876, s. 10.

(*f*) Act of 1601, s. 1; Act of 1844, s. 63.

(*g*) Poor Rate Act, 1839; Act of 1844, ss. 61, 62; Poor Law Amendment Act, 1866, s. 10; Local Government Act, 1894.

(*h*) Peers and members of parliament; justices of the peace; aldermen of London; clergymen; dissenting ministers; practising barristers and solicitors; registered

office (*i*). The appointment of overseers, and also of assistant overseers, is now (in the case of rural parishes) vested in the parish council, or in the parish meeting, created by the Local Government Act, 1894 (*k*). In urban parishes, however, they are still appointed by two justices of the peace, unless an order has been made by the Local Government Board authorizing the council of the borough or urban district to appoint or act as overseers, and to appoint assistant overseers (*l*). In the metropolis the new borough councils are the overseers (London Government Act, 1899).

The poor rate is raised prospectively (*m*) ; and for some given portion (usually one half part) of the year. It is at so much in the pound, according to the parochial assessment ; and upon a scale adapted to the probable exigencies of the parish (*n*). By the Poor Relief Act, 1601, it is directed to be raised by taxation of every "*occupier* of lands, houses, tithes impropriate, propriations "of tithes, coal mines, or saleable underwoods" in the parish ; and a man is rateable for all that he *occupies* in the parish, whether he is resident there or not, for example, in respect of a box at a theatre, or in respect of moorings in the river, or in respect of land used for advertising (*o*), or in respect of a tunnel, sewer, and the like. Corporate property (*e.g.*, the railroad of a railway company) is deemed for this purpose to be in the occupation of the corporation (*p*) ; but Crown property (*q*)

medical practitioners and dentists ; officers of the courts of law, of the army and navy, and of the customs and excise; inspectors under the Factory Acts ; and registrars of births, deaths and marriages (Archbold, *Poor Law*, 15th ed. p. 137).

(*i*) *R.* v. *Stubbs* (1788), 2 T. R. 395 ; Local Government Act, 1894, s. 20.

(*k*) Sect. 5.

(*l*) Sect. 33 (1).

(*m*) *R.* v. *Gloucester* (1793), 5 T. R. 346.

(*n*) 1 Nolan, 61, 62.

(*o*) Advertising Stations (Rating) Act, 1889.

(*p*) *Société Telegraphe* v. *Penzance Union* (1884), 12 Q. B. D. 552.

(*q*) *Martin* v. *West Derby Union* (1883), 11 Q. B. D. 145.

is exempt, and (by specific enactments) certain other property, *e.g.*, all churches and chapels (*r*). And by the Rating Act, 1869, the rating authority may at their discretion exempt Sunday schools and ragged schools (*s*); but the exemption does not extend to board or "council" schools (*t*), though it extends to voluntary schools (schools not provided by the local education authority), which are exempted by statute (*u*). The Act of Elizabeth was extended by the Rating Act, 1874 (*x*), to land used for a plantation or wood, or for the growth of saleable underwood, to rights of shooting and fishing, and to mines of every kind (other than the coal mines, which were already rateable); and underwoods are now rateable under this Act, and not under the Act of Elizabeth. By the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), occupiers of agricltural land are exempted from half their rates, one half being paid out of the local taxation account by the Commissioners of Inland Revenue. In general, the tenant (and not the landlord) is considered as the *occupier* within the statute of Elizabeth; but if the rateable hereditament be let for a term *not exceeding three months*, the occupier is entitled, under the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 1, to deduct the amount paid by him, in respect of poor rate, from the rent due to the owner. And (by sections 3 and 4 of the same Act) where the yearly rateable value of a dwelling-house does not exceed 8*l.* (or in the metropolis 20*l.*, in Liverpool 13*l.*, or in Manchester or Birmingham 10*l.*), the owner may agree or be ordered to be rated instead of the occupier (*y*), a provision so convenient for the collection of the rate,

(*r*) Poor Rate Exemption Act, 1833.

(*s*) *Bell* v. *Crane* (1873), L. R. 8 Q. B. 481; and 32 & 33 Vict. c. 40.

(*t*) *R.* v. *West Bromwich School Board* (1884), 13 Q. B. D. 929.

(*u*) Voluntary Schools Act, 1897, s. 3.

(*x*) 37 & 38 Vict. c. 54.

(*y*) *Lee* v. *West Ham Union* (1881), 8 Q. B. D. 69; 8 App. Ca. 386.

that it has been adopted also in connection with the highway rate (*z*).

The Act of 1601 further directed the poor rate to be raised, by the taxation of "every *inhabitant*, parson, vicar, and other" of the parish; and, as an "inhabitant," a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the stock in trade, and other local and visible personal property, he had within the parish, and of which he made profit. But this liability to taxation, in respect of inhabitancy, on the profits of a man's stock in trade and other his personal property, was taken away by the Poor Rate Exemption Act, 1840, a temporary Act which has been renewed annually ever since, by the Expiring Laws Continuance Acts.

By the Parochial Assessment Act, 1836, no poor rate was to be of any force which should not be made on an estimate of the net annual value of the several hereditaments rated, that is to say, the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant rates and taxes, and tithe commutation rentcharge, but deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses necessary to maintain the premises in a state to command such rent. And that statute prescribed also in what form the rate should be made, and what particulars it should comprise; and required that the parish officers should sign a declaration at the end, to the effect that the particulars therein were true and correct as far as they had been able to ascertain them by their best endeavours. These provisions, subject to an alteration in the form of declaration by the overseers of parishes in which a valuation list under the Union Assessment Committee Act, 1862, is in force (*a*), are substantially the provisions

(*z*) Highway Act, 1882.

(*a*) 25 & 26 Vict. c. 103, Sched.; Amendment Act, 1864, s. 11.

now applicable to the assessment of the poor rate. But, by this last-mentioned Act, as amended by the Amendment Act, 1864, further provisions have been made, for securing, by a fresh valuation where required, the uniform and correct assessment of all rateable hereditaments.

By the Act of 1601, s. 1, no rate is to be valid, unless it is allowed by two justices; and by the Poor Rate Act, 1743, as amended by the Parish Notices Act, 1837, s. 2, public notice thereof is to be given at the parish church, on the Sunday next after the same has been so allowed (*b*), or, if there is no church in the parish, notice of the rate must be given by affixing such notice in some public and conspicuous place in the parish (*c*). The allowance by the justices is, however, held to be a mere matter of form (*d*); and, after allowance and publication, any person aggrieved by the rate, and having reasonable objection to it as irregular or unequal, may appeal against it to the next practicable quarter sessions of the peace having jurisdiction in the place for which it was made (*e*). Rating appeals may also, in cases of irregularity, unfairness, or incorrectness in valuation of premises, be preferred under the Parochial Assessments Act, 1836, to the justices in petty sessions; who are, by the last-mentioned Act, required to hold, four times at least in every year, a special sessions for hearing poor rate appeals within their respective divisions (*f*). The decision of the justices in such special sessions is conclusive, unless the parties impugning their decision shall, within fourteen days, give notice of appeal therefrom to the next general sessions or quarter sessions of the peace. The justices in general

(*b*) *Ormerod* v. *Chadwick* (1847), 16 M. & W. 367; *Burnley* v *Methley Overseers* (1859), 1 E. & E. 789.

(*c*) 45 & 46 Vict. (1882), c. 20, s. 4.

(*d*) *R.* v. *Dorchester* (*Justices*) (1720), Str. 393.

(*e*) Local Government Act, 1888, s. 8.

(*f*) Sect. 6; Act of 1864, ss. 1—3; *R.* v. *Denbighshire* (1885), 15 Q. B. D. 451.

sessions, or at quarter sessions, have power to affirm, quash, or amend the rate; or, if it become necessary to set the whole aside, may order the overseers to make a new rate (*g*). They have authority also to award costs to the successful party (*h*), and they may state a special case on a point of law for the opinion of the Queen's Bench Division. Justices who are ratepayers of a parish, the rate for which is appealed against, cannot vote upon the appeal (*i*): but they are not disqualified by reason of their being ratepayers of some other parish in the union than that for which the rate appealed against is made (*k*). Judges of the High Court are not in any case now disqualified from hearing appeals to the High Court by reason of their being ratepayers of the parishes concerned (*l*).

It is the duty of the overseers, and of all persons having the collection, receipt, or distribution of the poor rate, to render to the proper auditors, once in every half-year, (and oftener if required by the Local Government Board,) an account of all moneys received and expended, and to verify the same on oath if required (*m*). They are not to make any profit by their office (*n*); and all balances remaining from time to time in the hands of the parish officers may be recovered from them (if necessary) by a summary proceeding before two justices of the peace (*o*). The overseers are bound also, in all cases, to render an account at the end of their year of office (*p*).

(*g*) Poor Relief Act, 1743, s. 6; Act of 1836, s. 6

(*h*) Act of 1743, s. 4.

(*i*) Justices Jurisdiction Act, 1742, s. 3.

(*k*) Act of 1864, s. 6.

(*l*) Jurisdiction in Rating Act, 1877, ss. 1, 3.

(*m*) District Auditors Act, 1879.

(*n*) Poor Law Amendment Act, 1834, s. 77; *Henderson* v. *Sherborne* (1837), 2 M. & W. 236.

(*o*) Vestries Act, 1831; Poor Law Amendment Act, 1834, ss. 47, 99; Poor Rate Act, 1839; Poor Law Amendment Act, 1844, ss. 32—38; *R.* v. *St. Marylebone* (1836), 5 A. & E. 268.

(*p*) Poor Law Amendment Act, 1834, s. 47.

Such is a general outline of the law relating to the poor: but for the minuter provisions of that law the student must consult the various Poor Law Acts themselves, and the treatises upon Rating. We will here only add, that *district rates* are, in general, levied upon the same assessment, and by the same officers, as the *poor rate*: and the *county rate* is also now raised through the poor law officials (*q*). It will be remembered, however, that, by the Local Government Act, 1894 (56 & 57 Vict. c. 73), as mentioned in a previous chapter, provision has been made for the constitution of parish councils and parish meetings in all rural parishes throughout England and Wales; and under that Act (s. 20), there are now no *ex officio* guardians of the poor, either in rural parishes or in any other parishes, all poor law guardians being now made elective, and the electors being the duly registered parishioners. The election also of the *overseers*, and of the *assistant-overseers*, in all rural parishes, is by that Act entrusted to the parish council (s. 5), or (when the parish has no council) to the parish meeting (s. 19); and the churchwardens, as such, have ceased to be overseers (s. 5), the powers, duties, and liabilities of the churchwardens, and also of the vestry of the parish, so far as they relate to the poor law, being, by the Local Government Act, 1894, transferred to the parish council (s. 6), or (as the case may be) to the parish meeting (s. 19), besides divers other specific powers, relating to matters which are unconnected or only remotely connected with the poor laws. That Act also contains provisions for extending to municipal boroughs and other urban districts (s. 33), the powers which by the Act are vested in the parish councils of rural parishes relative to the appointment of overseers and assistant overseers, besides other powers relative to the poor law.

(*q*) Rating Act, 1874, s. 10.

CHAPTER VII.

OF THE LAWS RELATING TO THE REGISTRATION OF BIRTHS AND DEATHS.

THE registration of births and deaths is either civil or ecclesiastical, the ecclesiastical registration being far the more antient.

I. *Ecclesiastical Registration.*—This system is said to be coeval with the *Protestant* Church, having been first established in the thirtieth year of Henry the Eighth, 1538 (*a*). Various enactments for its confirmation were passed in succeeding reigns; and by a canon (*b*) in the time of James the First (still in force), and by several statutes, particularly the Parochial Registers Act, 1812, further provisions were made for its regulation. The provisions of the Parochial Registers Act, 1812, still remain in force as regards the registration of *baptisms* and *burials*, although not of *marriages* (*c*). The Act provides, that registers of public and private baptisms and burials, solemnized according to the rites of the Established Church, in any parish or chapelry in England, shall be made by the rector, vicar, curate, or other officiating minister of the parish, in books of parchment or durable paper, and that in such books there shall be inscribed, within seven days at the latest after the ceremony (*d*), such particulars as are set forth in the schedule to the Act (*e*); and that, where the baptism or burial is

(*a*) Godolph. *Abridg.* 144.
(*b*) Canon 70, 1 Jac. 1.
(*c*) Births and Deaths Registration Act, 1836, s. 1.
(*d*) Sect. 3.
(*e*) Sect. 1.

solemnized elsewhere than in the parish church or churchyard by a clergyman not being the rector, vicar, or curate of the parish, he must transmit on that or the following day a certificate of the solemnization of the ceremony, to the minister of the parish, to be entered among the parish registers (*f*). The books containing such entries are to be carefully preserved by the officiating minister in a dry well-painted iron chest, and are not to be removed therefrom, except for the purpose of making such entries, or for other the specific purposes authorized by the Act (*g*); and an annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens, by post, to the registrar of the diocese, who is bound to make a report to the bishop whether he has duly received such copy or not (*h*), and to make out alphabetical lists of the entries. These lists are to be open to public search, at reasonable times, upon payment of certain fees (*i*).

With regard to burials, the statute of 1812, extended only to such interments as took place according to the rites of the Established Church. Accordingly, in 1853, it was necessary to make other provision (*k*) for the registration of interments which took place in cemeteries and grounds provided under the Burial Acts, 1852—1900 (*l*). By the Registration of Burials Act, 1864, and the Burial Laws Amendment Act, 1880, these or the like provisions have been extended to all burials whatsoever, which take place in any burial ground in England, the duty of registration

(*f*) Sect. 4, amended by Burial Act, 1857, s. 16.

(*g*) Sect. 5.

(*h*) Sects. 7, 8.

(*i*) Sect. 12; *Steele* v. *Williams* (1853), 8 Exch. 625.

(*k*) Burial Act, 1853.

(*l*) By the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 11, the expression "burial authority," is defined as "any burial board, any "council, committee, or other "local authority having the "powers and duties of a burial "board, and any local authority "maintaining a cemetery under "the Public Health (Interments) "Act, 1879, or under any local "Act."

(where not otherwise provided for) being thrown on the company, body, or persons to whom the burial ground belongs, or on the relatives of the deceased. The register books are directed to be sent from time to time to the registrar of the diocese; and any person who knowingly inserts any false entry in these registers or in the certified copies thereof, or who forges any part thereof, or wilfully destroys or injures the same, or knowingly certifies any fraudulent or defective copy, is guilty of felony, and is liable to penal servitude for life, or not less than three years, or to imprisonment for two years with or without hard labour and solitary confinement (*m*).

II. *Civil Registration.*—It was found that, under the ecclesiastical method of registering baptisms and burials, the entries were often incomplete and inaccurate, and also otherwise inadequate; for they extended only to such births and deaths as were afterwards attended with the proper ceremonies of the Church. At last, in the year 1836, in consequence of the report of a committee of the House of Commons appointed in 1833 to consider the general state of parochial registers and the laws relating thereto, a new system of registering births and deaths, wholly independent of the ecclesiastical method of registering baptisms and burials, was introduced by the Births, Deaths, and Marriages Act, 1836 (6 & 7 Will. IV. c. 86). This Act, with the Marriage Act of the same year (c. 85), introduced into England a complete system of registration of births, marriages, and deaths. Registration districts were established, and registrars therefor appointed; and various provisions were enacted, as regards the duties of these officers in registering births and deaths. The law upon the subject is now contained mainly in the Births and Deaths Registration Acts, 1836—1901, and particularly in the Births and Deaths Registration Act, 1874 (37 &

(*m*) Forgery Act, 1861, ss. 36, 37; Penal Servitude Acts, 1864 and 1891.

38 Vict. c. 88), which repealed much of the earlier legislation on the matter.

It is to be understood, then, that, under the combined effect of the Act of 1836, and the subsequent Registration Acts, every poor law union or parish is divided into registration districts (*n*); each of which is called by a distinct name, and possesses a *Registrar* (*o*), who must be either resident or have a known office therein (*p*), though he may in general act by *deputy* (*q*). The Registrars of each union are subjected to the supervision of their Superintendent Registrar, an office to be filled as of right, (in case of his due qualification and acceptance,) by the clerk to the guardians of the union, during the pleasure of the Registrar-General (*r*). The Registrar-General is an official appointed under the Great Seal, holding office during the pleasure of the Crown (*s*), and exercising authority over all Superintendent Registrars; and in fact, it is to him that (subject only to such regulations as may be made by the Local Government Board) (*t*), the management of the whole system of this registration, where no specific directions are given by the Acts, is entrusted. Provision is also made for the establishment of a proper office, to be called the "General Register Office," and of register offices for each union, to be placed under the respective superintendents, and for the preservation and safe custody of the registers when collected (*u*). The Acts also

(*n*) Act of 1874, s. 21; Act of 1901.

(*o*) Act of 1836, ss. 7, 10, 11; Poor Law Amendment Act, 1866, s. 1.

(*p*) Act of 1836, s. 16.

(*q*) *Ibid.* s. 12.

(*r*) *Ibid.* ss. 7, 10, 11; Poor Law Amendment Act, 1866, s. 1; Local Government Act, 1888, s. 24, sub-s. (2) (d).

(*s*) Act of 1836, s. 2; as to the registration of the births and deaths occurring among officers and soldiers of his Majesty's land forces out of the United Kingdom, see Registration, etc. (Army) Act, 1879.

(*t*) Act of 1836, s. 5; Local Government Board Act, 1871, ss. 2, 7.

(*u*) Act of 1836, s. 9.

contain regulations as to the uniform construction and durable materials of the *books* wherein the entries of all births, deaths, and marriages, are to be made (*x*).

The practical working out of the system depends mainly upon the *Registrars*, who have the following duties to perform :—

First, *as to Births*.—Every registrar is authorised and required to inform himself carefully of every birth which shall happen in his district ; and to learn and register, as soon after the event as may conveniently be done, such particulars as are required, by the schedule annexed to the Act of 1874, to be registered touching such birth (*y*). It is the duty of the father and mother of any child born alive, or, in their default, of the occupier of the house (if he knows of the birth), and of each person present thereat, and of the person having charge of the child, within forty-two days after the day of such birth to give to the proper registrar information of the particulars required to be registered concerning such birth ; and, in his presence, to sign the register (*z*). Even after a period of three months from the birth of the child has expired, registration may still take place ; only, in that case, a solemn declaration before the Superintendent Registrar as to the truth of the particulars required must be made by one of the persons on whom the statute imposes the duty of giving the information as to the birth, and he or she must sign the register in the presence both of the Superintendent Registrar and of the registrar of the district (*a*). After the expiration of twelve months from the time of the birth, no registry thereof can be made, except with the written authority of the Registrar-General, such authority being duly entered on the register (*b*). But births on board a

(*x*) Sect. 17.

(*y*) Act of 1874, ss. 4, 18 ; *In re Wintle* (1870), L. R. 9 Eq. 373.

(*z*) Act of 1874, s. 1 ; *R.* v. *Price* (1840), 11 A. & E. 727.

(*a*) Act of 1874, s. 5.

(*b*) *Ibid.*

vessel at sea are, of course, exempt from these specific provisions (*c*).

Secondly, *as to Deaths*.—It is the duty of every registrar to inform himself carefully of every death which happens in his district: and to register such particulars concerning the same as are specified in the schedule to the Act of 1874 (*d*). And it is the duty of the nearest relatives of the deceased, present at the death or in attendance during his last illness, and, in default of such relatives, of any other relative in the same district, and, in default of any such persons present at the death, of the occupier of the house (if he knows of such death having taken place), and, in his default, of each inmate of the house, and of the person causing the body to be buried, to give to the registrar information within the five days next following the day of death, according to the best of his knowledge and belief, of such particulars as are required to be registered touching the death (*e*). In the case of an inquest upon the body, such information is to be conveyed to the registrar, by the coroner before whom such inquest is held (*f*).

Four times in every year, each district registrar is to deliver, to his Superintendent, a certified copy of the entries made by him in his registry book, and finally the register itself, upon the book being filled; and the Superintendent, at the same intervals, is to transmit the same to the Registrar-General (*g*). The duties of the Registrar-General, into whose hands the documents thus ultimately fall, consist,—in addition to the general supervision of the working of the whole system,—in examining, arranging, and indexing the certified copies so sent; and he also compiles abstracts of their contents, and transmits the same, once in every year, to a principal secretary of state,

(*c*) Sect. 37; Merchant Shipping Act, 1894, s. 745.

(*d*) Act of 1874, s. 14.

(*e*) Sect. 10.

(*f*) Sect. 16; Coroners Act 1887, s. 45.

(*g*) Act of 1836, ss. 32, 34.

by whom such abstracts are afterwards laid before parliament (*h*).

Before we conclude this chapter, we may remark, that at the time of the introduction of the system of *civil* registration above explained, certain commissioners were appointed for inquiring into the state and authenticity of any registers (*other* than parochial) which at that time existed ; and they succeeded, in the course of a few years, in discovering about 7,000 such registers which were deemed authentic. The documents so discovered were, by the Non-Parochial Registers Act, 1840, placed under the care of the Registrar-General, together with the records of marriages and baptisms theretofore solemnized in the Fleet and King's Bench prisons, and at other irregular places ; and, by an express provision of the Act, all registers and records deposited in the General Register Office by virtue of the Act, of marriages and baptisms at the Fleet and elsewhere, are deemed to be in legal custody, and receivable in evidence accordingly in all courts of justice (*i*)

(*h*) Sect. 6.

(*i*) Act of 1840, s. 6 ; Act of 1858, s. 3. See, for a full list of the old registers, the Registrar-General's Report for the year 1895, p. 29.

CHAPTER VIII.

OF THE LAWS RELATING TO CHARITIES AND FRIENDLY AND OTHER SOCIETIES.

WE will next consider the laws relating respectively to charities, and Friendly and other kindred societies, all of which have, for their paramount objects, the relief of poverty, and the encouragement of thrift.

I. *Charities.*—These have been always much favoured by the law (*a*); for "no time," as Lord Coke observes, "was so barbarous as to abolish learning, or so uncharitable as to prohibit relieving the poor" (*b*). When gifts to *superstitious* uses were made void by the 23 Hen. VIII. (1531), c. 10, gifts for *charitable* purposes were held not to fall within the provisions of the statute; and by the 39 Eliz. (1597), c. 5, any person was enabled, by deed enrolled in Chancery, to found a hospital and to give it a corporate existence, with capacity to take and purchase goods and chattels, lands and tenements, and this without the king's licence in mortmain, and subject only to these conditions, that the lands were *freehold*, in fee simple, of the clear annual value of 10*l.*, and not exceeding 200*l.* in annual value. By the Statute of Charitable Uses of 1601 the lord chancellor was empowered to award commissions, to inquire of all gifts to such uses, and of all abuses and breaches of trust relative thereto, and to make orders for the future management of the charity funds (*c*); but the universities and cathedrals, and all colleges, hospitals, and

(*a*) Bac. Ab. *Ch. Uses*, E.
(*b*) *Porter's Case* (1592), 1 Rep. 26.
(*c*) Bac. Ab. *Ch. Uses*, F.; 2 Vern. 118.

free schools, having special visitors or governors, were excepted from this provision (*d*).

As however some abuses were found to attend the power of disposing of lands *by will* for charitable purposes it was enacted by the Mortmain Act, 1735, that no lands or hereditaments, or money to be laid out in the purchase thereof, should be given or conveyed, or anyways charged or encumbered, in trust for or for the benefit of any charitable uses, unless by conveyance *inter vivos*, and under conditions specified in the Act. The provisions of the Georgian Act have been re-enacted, but at the same time amended and relaxed by the Mortmain and Charitable Uses Acts of 1888 and 1891, referred to at more length in a former volume (*e*); and it will suffice to say, that there is now practically no restraint whatsoever, on gifts of lands by *will* for charitable purposes. Pure personal estate may, of course, be freely bequeathed for these purposes.

Commissions under the Act of 1601, to redress abuses in charities, have been long disused, their place being supplied by remedies of a simpler character; for, independently of any statute, the king, as *parens patriæ*, has a general superintendence over all charities not otherwise sufficiently protected. Also, wherever necessary, the king's attorney-general, at the relation of some informant (who is called the *relator*), may institute proceedings in Chancery, in his official capacity, to have the charity established, or to have the charity funds duly administered (*f*); and it is not essential that the relators should be the persons principally interested, for any persons (though the most remote of those who fall within the contemplation of the charity) may be relators (*g*).

(*d*) *Collison's Case* (1618), Hob. 136.

(*e*) *Vide sup.* vol. I. pp. 260—266.

(*f*) *Corporation of Ludlow* v. *Greenhouse* (1827), 1 Bligh. (N.S.) 17.

(*g*) *Attorney-General* v. *Bucknall* (1741), 2 Atk. 328.

Finally, by the Charities Procedure Act, 1812 (commonly called Sir Samuel Romilly's Act), in every case of the breach of any charitable trust, or wherever the direction of the court is necessary for the administration of such trust, any two or more persons may, on obtaining the previous sanction of the attorney or solicitor-general, apply for relief by *petition*, to be heard and disposed of in a summary way; and under the Charitable Trusts Acts hereinafter referred to, and under the general jurisdiction of the court as regulated by the orders and rules of 1883, divers summary applications for the due administration of charitable trusts are made competent.

By the Charitable Donations Registration Act, 1812, provision was made for the registration of charitable donations, in order to prevent their benefits from being lost; and the Act directed, as regards all then existing charities, that a memorial, stating the funds and objects thereof, the names of the founders (when known), the persons having the custody of the title deeds of the endowment, and the trustees or possessors of the estates, should be registered with the clerk of the peace of the county or town, and a duplicate of such memorial transmitted to Chancery, and as regards all future charities, that the like memorial should be registered within twelve months after the decease of the donor. But donations not secured on land or permanently invested in the funds, and donations the management of which was left to the discretion of trustees, were (with many other particular cases) excepted from the Act. The registration of such charitable gifts is part of the business which, by the Local Government Act, 1888 (*h*), s. 3, has now been transferred from quarter sessions to the county councils established by that Act.

Charitable endowments have been further protected by a long series of statutes passed in the eighteenth and the first half of the nineteenth century; but these need not

(*h*) 51 & 52 Vict. c. 41.

here be particularly examined. For, by a group of Victorian statutes known as "The Charitable Trusts Acts, 1853 to 1894" (*i*), a board of commissioners (called the Charity Commissioners for England and Wales) has been established, with power to examine into all charities, and to prosecute all due inquiries by its officers (including Assistant Commissioners, formerly called Inspectors); to require charity trustees and others to render to the Board written accounts and statements, or to attend and be examined on oath, in relation to any charity or its property; to authorise actions and proceedings concerning the same; to sanction building leases, repairs, and improvements, and sales and exchanges of charity lands; to frame and to approve new schemes, and (in cases of difficulty) to certify to parliament, for the approval of parliament, any such new schemes, for the better management of charities (*k*); and to permit a great variety of other acts to be done in relation to charities, such as the varying circumstances of each case may from time to time require.

The Charitable Trusts Acts also authorise the appointment of corporate bodies, called The Official Trustees of Charity Lands, and The Official Trustees of Charitable Funds, in whom respectively the lands, stocks, securities, and moneys of charities may from time to time become or be vested by order of the court (*l*); and the Commissioners may order these corporations respectively to convey the land, or to assign and pay over the stocks, securities, and moneys, as they shall think expedient (*m*). And although by the Roman Catholic Charities Act, 1859, charities or institutions *exclusively for the benefit of Roman*

(*i*) 16 & 17 Vict. (1853), c. 137; 18 & 19 Vict. (1855), c. 124; 23 & 24 Vict. (1860), c. 136; 25 & 26 Vict. (1862), c. 112; 32 & 33 Vict. (1869), c. 110; 50 & 51 Vict. (1887), c. 49; 54 & 55 Vict. (1891), c. 17; and 57 & 58 Vict. (1894), c. 35.

(*k*) Act of 1853, ss. 54, 60.

(*l*) Act of 1853, ss. 48, 53; Act of 1855, s. 15, &c.

(*m*) Act of 1855, s. 37; Act of 1887.

Catholics were for some time exempt from the jurisdiction of the Charity Commissioners, these charities are now, to a certain extent, subject to that jurisdiction, the Roman Catholic Charities Act, 1860, having enacted, that (in cases where an estate is given on trust for the exclusive benefit of Roman Catholics, but is invalidated by reason of certain of the trusts being of the class deemed superstitious or otherwise illegal) such estate or its income shall be apportioned in Chancery, or by the Charity Commissioners, and a fixed proportion thereof shall be declared subject to the lawful trusts, and the residue subject to such trust for the benefit of persons professing the Roman Catholic religion, as the court or board may, under the circumstances, consider just. Also, by the City of London Parochial Charities Act, 1883, the Charity Commissioners have been entrusted (subject to the regulation of the High Court) with the management and disposition of the parochial charities within the city; and under the Local Government Act, 1894, the Charity Commissioners exercise a controlling power over the charities of rural parishes, the management of which is now vested in the parish councils. For the Local Government Act, 1894 (56 & 57 Vict. c. 73), transfers to and vests in the parish council of every rural parish all the charitable property (not being church property) theretofore vested in the overseers, or in the churchwardens and overseers, of the parish (s. 5); and enables the parish council to acquire further endowments for the parish (s. 8), and to deal therewith, subject to the control of the Local Government Board or of the Charity Commissioners (ss. 8, 14). For the purposes of the London Government Act, 1899, the Charity Commissioners "have "the like powers with respect to charities, subject to the "like appeal, as they have under and for the purposes of "the Local Government Act, 1894" (Local Government Act, 1899, s. 23).

A great number of cases, however, are exempted from

the operation of the Charitable Trusts Acts; for these Acts extend not to (among other charities) the universities of Oxford, Cambridge, London, or Durham, nor to any college or hall in those universities, nor to any cathedral or collegiate church (*n*), nor to the colleges of Eton and Winchester (*o*). But as regards "prison charities," within the Prison Charities Act, 1882 (*p*), these are only partially exempt from the jurisdiction of the charity commissioners; and any of the excepted charities may petition the Board to have the benefit of the above enactments allowed to them. And any charities whatever may refer to the Board any questions or disputes arising between or among their members, touching the constitution or the management of the charity (*q*).

Some account having now been given of the legislative enactments relating to charities, we will next advert to certain general principles which may be collected from the judicial decisions in regard to charitable donations, trusts, and endowments. First, all trustees of charities may be called to account in Chancery for the funds committed to their charge, and new trustees, (where circumstances so require,) may be appointed (*r*); improvident alienations of charitable estates may be rescinded; schemes for carrying properly into effect the intentions of the donor, or (where the case calls for such interference) for varying his intentions in the manner hereinafter explained, may be established; and in fact every species of relief may be afforded, which it is in the nature of such institutions to require. But in the case of corporations endowed for charitable purposes, the management is usually vested in

(*n*) Act of 1853, s. 62.

(*o*) Act of 1855, ss. 47—49.

(*p*) 45 & 46 Vict. c. 65.

(*q*) Act of 1853, s. 64; Act of 1855, s. 46; Act of 1869, s. 14.

(*r*) Such new trustees may also (without the aid of the court) be appointed under the Trustee Appointment Acts, 1850 to 1890 (13 & 14 Vict. (1850), c. 28; 32 & 33 Vict. (1869), c. 26; and 53 & 54 Vict. (1890), c. 19), in the case of all trusts for religious or educational purposes.

governors, subject to a controlling or visitatorial power in the founder and his heirs, or in such persons as the founder shall appoint (*s*); and with the proceedings of such functionaries the law does not in general interfere, unless they have also the management of the revenues, and are found to be abusing their trust (*t*). It is to be observed, however, that, when the king is the founder of an eleemosynary lay corporation, the visitatorial power is vested in the Crown, and is committed by royal authority to the lord chancellor, who may thus be called upon to redress abuses properly falling within the province of a visitor; but the jurisdiction belongs to him in his personal character only, as representative of the Crown, and not as a judge in Chancery (*u*).

Secondly, with regard to the nature of charitable trusts, we may remark, that the word *charitable* is to be understood in a very large sense; as including not only gifts for the benefit of the poor, but also all endowments for the advancement of learning (*x*), as well as institutions for the advancement of science and art, and for any other useful and public purpose falling within the charitable uses enumerated in the preamble to the Act of 1601, which is repeated in sect. 13 of the Mortmain and Charitable Uses Act, 1888, or falling within the meaning and intendment of such preamble (*y*). The term comprises also donations for pious or religious objects, all objects being deemed religious which tend to the benefit either of the Established Church of England, or of any body of Dissenters; and trusts for the maintenance of the

(*s*) *Eden* v. *Foster* (1725), 2 P. Wms. 326; *R.* v. *Governors of Darlington Free Schools* (1844), 6 Q. B. 682.

(*t*) *Ex parte Berkhampstead Free School* (1813), 2 V. & B. 138; *Attorney-General* v. *Talbot* (1747), 3 Atk. 673.

(*u*) Co. Litt. 96 a; *R.* v. *St. Catherine's Hall* (1791), 4 T. R. 233.

(*x*) *Attorney-General* v. *Whorwood* (1750), 1 Ves. sen. 537.

(*y*) *Attorney-General* v. *Heelis* (1824), 2 Sim. & St. 67; *Trustees of British Museum* v. *White* (1826), *ib.* 594.

Roman Catholic worship (subject always to the law against uses deemed superstitious) were also long ago placed on a similar footing (*z*). And though a trust for the advancement of the Jewish religion, as well as of any other faith hostile to Christianity, was at one time held illegal, and as such was excluded from the protection of Chancery (*a*), it was provided, by the Religious Disabilities Act, 1846, and the Liberty of Religious Worship Act, 1855, that her Majesty's subjects professing the Jewish religion should be liable, in respect of their schools, places for religious worship, education, and other charitable purposes, and the property held therewith, to the same laws as those to which her Majesty's Protestant subjects dissenting from the Church of England were liable, and to no other. In fact, it would seem that every gift in which a very large or indefinite body of persons may claim to participate is a "charitable gift" (*b*). But the definition of charitable trusts does not include gifts of a strictly private character; for if a sum of money be bequeathed with a direction to apply it "to such purposes of benevolence and liberality as the executors shall approve," or even "in private charity," no charitable trust will be created, *i.e.*, no such trust as will be taken cognizance of in Chancery. On the other hand, where a gift is for a purpose clearly falling within the description of charity, though expressed in the most general and indefinite terms, the trust will never be allowed to fail on account of its uncertainty; but the law will provide for it some particular mode of application. And sometimes the king himself, by his chancellor or other great officer, but more usually the Court of Chancery, directs the disposition in such a case (*c*).

Thirdly, it is a rule, with respect to all charities, that the

(*z*) Roman Catholic Charities Acts, 1832 and 1860; Liberty of Religious Worship Act, 1855, s. 2.

(*a*) *In re Masters, &c. of the Bedford Charity* (1818), 2 Swanst. 487; *Da Costa* v. *Da Paz* (1754), 1 Dick. 258.

(*b*) *Re Foveaux*, [1895] 2 Ch. 501.

(*c*) Bac. Ab., *Ch. Uses*.

intention of the donor, so far as it is practicable and legal, shall be strictly observed; the law not permitting it to be varied without necessity, even by consent of his heirs (*d*). But where such intention is incapable of being literally acted upon, or its literal performance would be unreasonable, a decree will be made for its execution *cy-près*, that is, in some method conformable to the general object, and adhering as closely as possible to the specific design, of the donor (*e*). For example, where a sum of money was bequeathed to trustees, to be distributed among the inhabitants of several specified parishes, in money, provisions, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large to be suitably confined to those objects, the court directed it to be applied to the further objects of instructing and apprenticing the children of those parishes to benefit which the charity was designed (*f*): and, on a somewhat similar principle, in the case of meeting-houses founded for dissenters, it was declared, by the Nonconformists Chapels Act, 1844, that, where no particular religious doctrines or mode of worship should have been prescribed by the deed or instrument of trust, the usage of the congregation for twenty-five years should be taken as conclusive evidence of the doctrines and worship to be observed or practised therein (*g*).

Lastly, we may remark, that, though among the civilians a legacy to pious or charitable uses was entitled to a preference over other bequests in a will, it is not so by our law, which directs that in the case of a deficiency of assets, the charitable legacies shall abate *pro ratâ* with the

(*d*) *Att.-Gen.* v. *The Margaret and Regius Professors in Cambridge* (1682), 1 Vern. 55.

(*e*) *Chamberlayne* v. *Brockett* (1872), L. R. 8 Ch. App. 206; *In re Clark's Trusts* (1875), 1 Ch. D. 497.

(*f*) *Att.-Gen.* v. *Mansfield* (1845), 14 Sim. 601; *Re Campden Charities* (1881), 18 Ch. D. 310.

(*g*) *Att.-Gen.* v. *Bunce* (1868), L. R. 6 Eq. 563.

others; but the testator himself may give the charitable legacies a priority over all other legacies (*h*).

II. *Friendly Societies.*—Mutual benefit societies were first regulated by law in 1793. After a long series of amending statutes, the Friendly Societies Act, 1875 (*i*), repealed all the earlier Acts, but was itself in turn amended and explained by a number of additional statutes. All these societies are now governed by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), another consolidating statute which came into force on the 1st January, 1897; and this again has been supplemented by the Collecting Societies and Industrial Assurance Companies Act, 1896, and by a statute passed in the year 1898. Under the Friendly Societies Act, 1896 (as under the former Acts) the following classes of societies may be registered:

1. *Friendly Societies proper* (with or without *Branch Societies*) established to provide by voluntary subscriptions of the members, either with or without the aid of donations, for one or other of the following objects:—(i.) The relief or maintenance of the members, their families, relations, or orphan wards, during sickness or other bodily or mental infirmity, in old age (which means after the age of fifty) or in widowhood, or for the relief or maintenance of the orphan infant children of members; (ii.) Insuring money to be paid on the birth of a member's child, or on the death of a member, or for funeral expenses or (in the case of Jews) for living

(*h*) *Miles* v. *Harrison* (1874), L. R. 9 Ch. App. 316; *In re Arnold, Ravenscroft* v. *Workman* (1888), 37 Ch. D. 637.

(*i*) 38 & 39 Vict. c. 60. But the 17 & 18 Vict. (1854), c. 56 (being the Act which specially provided for certain then existing Friendly Societies, whose powers extended to granting policies of assurance on the death of members exceeding 1,000*l.*) remained in force, excepting as regards the proviso in sect. 8; though such societies were no longer to be deemed Friendly Societies.

expenses during the period of confined mourning; (iii.) The relief or maintenance of members, when on travel in search of employment, or when in distress, or in case of shipwreck or of loss of or damage to boats or nets; (iv.) The endowment of members or of their nominees at any age; or (v.) Insurance against fire, of tools or implements of trade, to the amount of 15*l.* (*k*). But no such society may grant any annuity exceeding 50*l.* per annum, or an assurance exceeding 200*l.* gross sum; also, careful enactments are made to prevent abuse in insurances on the lives of children (*l*).

2. *Cattle Insurance Societies*, for the insurance to any amount, against loss of neat cattle, sheep, lambs, swine, and horses, by death from disease or otherwise.

3. *Benevolent Societies*, for any benevolent or charitable purpose, as distinct from mutual purposes (*m*).

4. *Working Men's Clubs*, for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and physical recreation.

5. *Specially Authorized Societies*, for any purpose authorized by the Treasury as those to which the Act of 1896 should be extended (*n*).

Such being the different classes of societies which may be registered, it is to be observed, that the general superintendence of all Friendly Societies is entrusted to a chief registrar and assistant registrars (termed in the Act, "the Central Office"), a report of whose proceedings is to be laid annually before parliament (*o*). No society can apply to be registered which does not consist of seven

(*k*) Act of 1896, s. 8 (sub-s. (1)).

(*l*) *Ibid.* ss. 62—67, 84.

(*m*) As to what is a charity, *cf. In re Buck*, [1896] 2 Ch. 727.

(*n*) *Trade Unions* may also be registered (see Trade Union Acts, 1871 and 1876); and the registrar of friendly societies is also the registrar of trade unions. But such unions are not (properly speaking) Friendly societies; nor do the Friendly Societies Acts in general include them (*R. v. Registrar of Friendly Societies* (1872), L. R. 7 Q. B. 741).

(*o*) Act of 1896, ss. 1—7.

persons at the least (*p*); and every registered society is required to have a registered office (*q*), to appoint trustees, to submit its accounts for audit once at least in every year (*r*), and to send to the registrar an annual return of the receipts and expenditure, funds, and effects of the society, as well as quinquennial returns of certain particulars mentioned in the Act (*s*). Registered societies are subjected to the Treasury Regulations, 1897, 14—20. A certificate of registration given by the registrar is *primâ facie* evidence of the due registration of the society; and in case of the registrar's refusal to register, an appeal lies to the King's Bench Division (*t*).

Several privileges are acquired by registration. Registered societies are exempt from the provisions of the Unlawful Societies Act, 1799, and the Seditious Meetings Act, 1817 (*u*); and also from the payment of certain stamp duties which would otherwise be chargeable on them in the transaction of their business (*x*). Any member not under the age of sixteen may (subject to the regulations of the society) cause any money payable on his death, to the extent of 100*l*., to be paid over to his nominee, and exercise other rights from which his non-age would, under the general law, exclude him (*y*); and upon his death intestate without making any nomination, such money (not exceeding the amount aforesaid) may be paid over to the person or persons appearing to the trustees to be entitled thereto, without the necessity for letters of administration (*z*). Further, the society has, to a certain extent, a preference over other creditors in the case of death, bankruptcy, or insolvency of its officers, with the money or property of the society in their possession (*a*). As to the general property and funds of the society, the

(*p*) Sect. 9.
(*q*) Sect. 24.
(*r*) Sects. 25, 26.
(*s*) Sects. 27, 28.
(*t*) Sects. 11, 12.
(*u*) Sect. 32.
(*x*) Sect. 33.
(*y*) Sect. 56.
(*z*) Sect. 58.
(*a*) Sect. 35.

trustees may invest the same, subject to the Act, either in a savings bank, or in the public funds, or with the National Debt Commissioners, or even in the purchase of land, or in the erection of buildings thereon, or upon any other security expressly directed by the society's rules, not being (unless in the case of loans to members) personal security ; and all property of the society vests in the trustees thereof for the time being, for the use and benefit of the society and its members (*b*). The Act contains also provisions to the effect, that every dispute between a member, or one claiming under him or under the rules, and the society, shall be decided in such manner as shall be directed by the rules ; and shall not be removable into any court of law, though the decision, when made, may be *enforced* by application to the county court of the district. But where the rules contain no direction as to disputes, or where the decision is unreasonably delayed, application for a decision may be made either to a court of summary jurisdiction—that is, to the justices—or to the county court (*c*). The Act contains also minute provisions regulating the secession of lodges and branches, from other branches, or from the parent or principal society, and for the dissolution of the society, and for the ascertainment and liquidation or distribution of its assets and liabilities (*d*).

By the Societies' Borrowing Powers Act, 1898, a "specially authorized society" may (if its rules so provide) receive deposits and borrow money at interest, from its members or from other persons.

There is a class of societies, called *Industrial and Provident Societies*, which are similar in many respects to Friendly Societies, and may, like them, be registered. Industrial and Provident Societies are now regulated by

(*b*) Sect. 44 ; *In re Coltman*, *Coltman* v. *Coltman* (1881), 19 Ch. D. 64.

(*c*) Sect. 68.

(*d*) Sects. 78—83.

the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), which repeals the earlier Act of 1876, but re-enacts, with divers amendments, the provisions of the repealed Act ; and the principal Act itself has been, in some slight particulars, amended by the Industrial and Provident Societies Acts, 1894 and 1895. But regarding these societies, and certain others referred to in the foot-note below (*e*), we must refer the student to the Acts themselves, merely observing that they resemble, in most particulars, the ordinary Friendly Societies we have already spoken of.

III. *Benefit Building Societies.*—These are societies established with the principal object of raising a subscription fund, by levies from the members of the society, and of making advances thereout to the members, to enable them to build or purchase dwelling-houses, or to purchase land ; the advances being secured to the society by mortgage of the premises so built or purchased. The existing Building Societies Acts are those of 1874 (the principal Act), 1875, 1877, 1884, and 1894. Under these Acts, societies of this description, (their rules being duly registered as required by the Acts, and being duly certified by the registrar,) have certain special privileges and exemptions. Thus, their members enjoy the protection of limited liability, may transfer their shares without payment of stamp duties, and may procure re-conveyances of the property mortgaged by them to their society, by a mere receipt for the money advanced indorsed on the mortgage deed, without incurring the expense of a formal re-conveyance (*f*). But a mortgage to a building society is not exempt from stamp duty, although the re-conveyance is exempt (*g*). These societies had originally no

(*e*) Loan Societies Act, 1840 (as to *loan* societies) ; and Discharged Prisoners' Aid Act, 1862, and Prison Act, 1865 (as to *discharged prisoners' aid* societies).

(*f*) Act of 1874, ss. 14, 41, 42.

(*g*) *Ibid.* ss. 41, 42.

power to borrow (*h*), in the absence at least of a rule expressly authorizing them to do so; but a limited power of borrowing money has now been conferred upon them by the principal Act (*i*). All disputes between the society and its members are to be settled by the convenient and economical method provided by the Act, being in general arbitration (*k*). Lastly, the society (which may be either a terminating or a permanent one) may be dissolved upon the happening of the event on which it is by the rules made to determine, or it may be dissolved in any manner as prescribed by its own certified rules or by the Act, or it may be wound up either voluntarily or compulsorily under the Companies Acts, 1862—1900.

(*h*) *Ex parte Watson* (1888), 21 Q. B. D. 301; *Blackburn Benefit Building Society's Case* (1884), 9 App. Ca. 857.

(*i*) Act of 1874, s. 15.

(*k*) *Ibid.* ss. 34, 35; *Mulkern* v. *Lord* (1879), 4 App. Ca. 182; and (since the Act of 1884) *Municipal, etc. Society* v. *Richards* (1888), 39 Ch. D. 372.

CHAPTER IX.

OF THE LAWS RELATING TO EDUCATION.

THE duty of the state to educate its citizens has been but slowly recognised by parliament (*a*). At the beginning of the nineteenth century neither local nor central bodies had been established in England and Wales to carry out the work of public instruction. Between 1806 and 1833 many fruitless efforts were made to set up some form of public instruction. In 1833 the House of Commons voted the first grant (20,000*l.*) in aid of education. This grant was administered by the Treasury, which practically depended for its distribution upon the advice of the Anglican "National Society" and the undenominational "Society "for Promoting Christian Knowledge," there being few schools available for public elementary education except those established by the clergy of the Church of England and the other religious societies. The schools of these societies were the forerunners of the modern voluntary schools, which still retain elements of a private character under the Education Act of 1902. In 1839 a special committee of the Privy Council was appointed to administer the annual grant. In 1856, by an Order in Council, an Education Department was founded, and in the same

(*a*) The principal Acts of Parliament dealing with elementary and higher education are—

1. The Elementary Education Acts, 1870 to 1900, with which should be included the Voluntary Schools Act, 1897.

2. The Industrial and Reformatory Schools Acts, 1866—1899; and the Youthful Offenders Act, 1901.

3. The Welsh Intermediate Education Act, 1889.

4. The Education Act of 1902, which repeals some of the above Acts in part (see Fourth Schedule to the Act).

year the first Education Act was passed (19 & 20 Vict. c. 116) creating the new office of vice-president of the committee of the privy council, a ministerial office to be held by a member of the House of Commons. The grant grew steadily, until in 1861 it reached 842,806*l*. In that year a system of payment by results (*i.e.*, by examinations under inspectors appointed by the committee) was instituted. Moreover the minutes and regulations of the department were amended and consolidated ; and a revised code was issued, in which the object of government grants in aid of education was declared to be "to promote the "education of children belonging to the classes who "support themselves by manual labour." The voluntary system remained, with slight alterations by Acts of Parliament and departmental orders, until 1870, when parliament passed the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), which still—except as regards the organisation and constitution of local authorities—remains the basis of elementary education in England and Wales. By that Act, as will be seen, school boards and board schools were established. School boards were local authorities for purposes of elementary education ; and although by the Education Act, 1902, school boards are abolished and their place taken by county, borough, or district councils, nevertheless education is so important and peculiar a branch of local government that it seems most convenient to continue to treat it, like the law of public health, in a separate chapter, in spite of the fact that these two departments are not any longer under what is called an "*ad hoc*" body.

By the Board of Education Act, 1899, there was constituted the Board of Education (*b*), consisting of a President, of the Lord President of the Council (unless he is appointed President of the Board), his Majesty's Principal Secretaries of State, the First Commissioner

(*b*) 62 & 63 Vict. c. 33, s. 1.

of his Majesty's Treasury, and the Chancellor of the Exchequer; and the Board now takes the place of the Education Department (*c*). As, however, elementary instruction is not the only aspect of education which has a public character, this chapter will be devoted to the discussion—I. Of Public Elementary Education; II. Of Higher Education and Technical Instruction; III. Of Public and of Endowed Grammar Schools; IV. Of Sites for Poor Schools, and for Literary and Scientific Institutions; V. Of Pauper Schools; VI. Of Reformatory Schools; and VII. Of Industrial Schools.

I. *Public Elementary Education.*—The chief provisions on this subject will, as we have said, still be found in the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the general scheme of which remained unaltered until the passing of the Education Bill brought before parliament in 1902, although in certain points of detail alterations had been effected (*d*). Under the scheme of the Act of 1870, the whole of England was portioned out into *school districts;* and, for each district, it was enacted that there should be provided a sufficient amount of accommodation in public elementary schools, available for all the children resident in such district, for whose elementary education efficient and suitable provision was not otherwise made (*e*).

The areas constituted school districts by the Act of 1870 were the Metropolis, and, outside the Metropolis, every borough and, speaking generally, every parish not included in a borough. But by the Education Act, 1902, the council of every county and county borough, and also

(*c*) *Ibid.* s. 2.

(*d*) Elementary Education Acts, 1873 (36 & 37 Vict. c. 86); 1876 (39 & 40 Vict. c. 79); 1880 (43 & 44 Vict. c. 23); 1890 (53 & 54 Vict. c. 22); 1891 (54 & 55 Vict. c. 56); and 1897 (60 & 61 Vict. c. 16); as to *voluntary* schools, 1897 (60 & 61 Vict. c. 5), and (as to blind and deaf children) 1893 (56 & 57 Vict. c. 42).

(*e*) 33 & 34 Vict. c. 75, s. 5.

of every non-county borough with a population of over 10,000, and of every urban district with a population of over 20,000, is constituted the local education authority for purposes of elementary education (*f*). The object of the Act of 1870 was to provide schools at the public expense in districts where the accommodation provided by the existing voluntary schools was insufficient. The general execution of the scheme of the Act of 1870 was entrusted to the Education Department, which might order a new body to be elected for that purpose in each school district. These bodies were called school boards. Their powers and duties, as well as those of school attendance committees (*g*), have now, by the Act of 1902, been transferred to the local education authority (*h*). The Act of 1902 does not apply to London. Accordingly, the school board for London continues in the exercise of its powers and duties, and the Metropolis still continues to be governed in matters of elementary education, as before, by the Elementary Education Acts. 1870 to 1900. School boards and school attendance committees being elsewhere abolished, the new local education authority is made responsible for all secular instruction in all public elementary schools, whether provided (board) or not provided (voluntary), and is required to maintain and keep efficient all public elementary schools within its area which are necessary, to control all expenditure needed for that purpose, and to provide a sufficient amount of school accommodation without payment of fees (*i*).

Each school must be conducted in accordance with the regulations provided by the Acts, of which the principal are the following:—(1) That it shall not be required, as a condition of any child being admitted to or continuing

(*f*) Sect. 1.

(*g*) Created in 1876 by 39 & 40 Vict. c. 79, to enforce compulsory attendance of children in districts where no school boards existed.

(*h*) Sect. 5.

(*i*) Sects. 5, 7, 16.

in a school, that he shall attend (or abstain from attending) any Sunday school or place of public worship, or that he shall attend any religious observance or instruction from which he may be withdrawn by his parents ; (2) That the period during which any religious observance is practised, or instruction in religious subjects given, in the school, shall be at prescribed times either at the beginning or at the end of the school hours ; (3) That the school shall at all times be open to the inspection of his Majesty's inspectors of schools, who shall not, however, in the exercise of their duties, inquire into the instruction given to the scholars in religious subjects (*k*) ; and (4) That, in the case of schools provided by the local education authority, no religious catechism or formulary, which is distinctive of any particular denomination, shall be taught in the school (*l*). In the case of schools which are not provided by, but are maintained by, the local education authority (*i.e.*, voluntary schools), the religious instruction given must be in accordance with the provisions (if any) of the trust deed relating thereto, and is under the control of the managers, unless there is in the trust deed a provision for reference to the bishop or superior ecclesiastical or other denominational authority. In the latter case, so far as such provision gives to the bishop or authority the power of deciding whether the character of the religious instruction is or is not in accordance with the provisions of the trust deed, the provisions of the deed must be observed (*m*). If the local education authority fails to fulfil any of its duties under the Elementary Education Acts, 1870 to 1900, or the Education Act, 1902, or fails to provide such additional public school accommodation, within the meaning of the Elementary Education Act, 1870, as is in the opinion of the Board of Education

(*k*) Act of 1870, s. 7.

(*l*) *Ibid.* s. 14 ; *Att.-Gen.* v. *English*, and *National Society* v. *London School Board* (1874), L. R. 18 Eq. 608.

(*m*) Act of 1902, s. 7 (6).

necessary in any part of its area, the Board of Education may, after holding a public inquiry, make such order as it thinks necessary or proper for the purpose of compelling the authority to fulfil its duty; and any such order may be enforced by *mandamus* (*n*).

Until the year 1870, parents were under no general statutory obligation to cause their children to be educated. But the Elementary Education Act, 1870, enabled school boards to make, with the approval of the Education Department, by-laws for all or any of the following purposes:—(1) Requiring the parents of children between the ages of five and thirteen to cause such children (unless there is some reasonable excuse) to attend school; (2) Determining the time during which the children are so to attend school; and (3) Imposing penalties for breach of the by-laws.

The exercise of this power was, it will be seen, optional. By the Elementary Education Act, 1876, however, it was expressly declared to be the duty of the parent of every child between the ages of five and fifteen to cause it "to re- "ceive efficient elementary instruction in reading, writing, "and arithmetic" (*o*). If this duty in regard to a child above the age of five years is habitually and without "reasonable excuse" neglected, it is the duty of the local education authority, after due warning to the parent, to complain to a court of summary jurisdiction (*p*); by which an "attendance order" may be made, the non-compliance with which may be visited with a pecuniary penalty. And all persons are prohibited, under a penalty, from taking into their employment (subject to certain exceptions) any child, who is under the age of eleven, or who, being above that age but under the age of fourteen, is not *certificated*, or allowed by law to be fully or partially so employed (*q*). In the last resort, the child may be

(*n*) Act of 1902, s. 16.
(*o*) Act of 1876, s. 4.
(*p*) *Ibid.* s. 11.
(*q*) *Ibid.* ss. 5, 6, 9; Act of 1893.

sent to a certified industrial school, to the expenses of which the parent will be liable to contribute.

By the Elementary Education Act, 1880, the exercise of the power to make by-laws respecting the attendance of children at school was made compulsory (*r*); and it therefore is now the duty of the local education authority to make such by-laws, if none exist in its district. No such by-law may be contrary to anything contained in any Act for regulating the education of children employed in labour; and every by-law must provide for the total or partial exemption of any child between the ages of ten and thirteen, if one of his Majesty's inspectors certifies that such child has reached a standard of education specified in such by-law (*s*). Reasonable excuses for the non-attendance of a child are:—(1) that it is under efficient instruction in some other manner; (2) that it has been prevented from attending by sickness or other unavoidable cause; (3) that there is no public elementary school open which the child can attend within the distance fixed by the by-laws from the child's residence, which distance must not exceed three miles by the nearest road (*t*).

The age up to which the attendance of children at school may be required by these by-laws is raised by the Elementary Education Act, 1900, from thirteen years to fourteen years (*u*).

Elementary education is provided free for children in all schools which receive the "fee grant," which is a grant, paid out of moneys provided by parliament, of ten shillings a year "for each child of the number of children "over three and under fifteen years of age, in average "attendance at any public elementary school in England "or Wales (not being an evening school), the managers of

(*r*) 43 & 44 Vict. c. 23, s. 2.
(*s*) Act of 1870, s. 74.
(*t*) *Ibid.*
(*u*) 63 & 64 Vict. c. 53, s. 6.

" which are willing to receive the same, and in which the " Board of Education are satisfied that the regulations as " to fees are in accordance with the conditions" in the Elementary Education Act, 1891 (*y*). Under exceptional circumstances a fee not exceeding sixpence per week per child may be charged (*z*). The ordinary expenses of a council as local education authority are paid, if not otherwise provided for, in the case of a county out of the county fund, and in the case of a borough, out of the borough fund or rate, or, if no borough rate is levied, out of a separate rate to be made, assessed, and levied in like manner as a borough rate (*a*); and, in the case of the council of an urban district not a borough, out of a fund raised out of the poor rate of the parishes comprised in the district (*b*). But grants made by parliament under various statutes form a substantial part of the income of a local education authority.

11. *Higher and Technical Education.*—Although, as has been shown, provision was made by the Elementary Education Act, 1870, for elementary education, education, except the elementary education of children up to the age of fourteen, was left, until 1889, almost entirely to voluntary effort. The school boards had no authority to provide education, except for children up to the age of fourteen, and this only such education as could be described as "elementary." An attempt made by the London School Board to give instruction in science and art was held by the Court of Appeal, affirming a judgment of the High Court of Justice, to be beyond its statutory powers (*c*); and the establishment by that Board of schools for the education of pupil teachers was also held to be *ultra vires* (*d*). But, by the Education Act, 1902,

(*y*) 54 & 55 Vict. c. 56, s. 1.
(*z*) *Ibid.* s. 4.
(*a*) Act of 1902, s. 18.
(*b*) *Ibid.*; Act of 1876, s. 33.
(*c*) *R.* v. *Cockerton*, [1901] 1 K. B. 726.
(*d*) *Dyer* v. *London School Board*, [1902] 2 Ch. 768.

power is given to the local education authority, after consultation with the Board of Education, to supply, or aid the supply, of education other than elementary, and to promote the co-ordination of all forms of education (*e*).

In Wales, however, a system of "intermediate education" was established by the Welsh Intermediate Education Act, 1889 (*f*), which provides for the constitution in every county of Wales, and in the county of Monmouth, of a joint committee consisting of three persons nominated by the county council, and two persons, being persons well acquainted with the conditions of Wales and the wants of the people (*g*), whose duty it is to formulate a scheme for the intermediate and technical education of the inhabitants of the county (*h*), the expenses of which, so far as they exceed the amount yielded by any endowment appropriated for the purpose (*i*), and any parliamentary grant (*k*), may be defrayed by the county council out of the county fund (*l*).

In 1864, a Royal Charter was granted, by which the Lord President of the Privy Council for the time being, and the Vice-President of the Committee on Education for the time being, were constituted a body corporate under the name of the Department of Science and Art. This body, which is now merged in the Board of Education (*ll*), receives parliamentary grants, which it devotes to the advancement and encouragement of science and art. By the Technical Instruction Act, 1889 (*m*), local authorities, which are county councils, borough councils, and urban district councils (*n*), were empowered, out of the local rate, to supply, or aid the supply, of technical or manual instruction (*o*); and though this Act, with its

(*e*) 2 Edw. 7, c. 42, s. 2.
(*f*) 52 & 53 Vict. c. 40.
(*g*) *Ibid.* s. 5.
(*h*) *Ibid.* s. 3.
(*i*) *Ibid.* s. 3.
(*k*) *Ibid.* s. 9.
(*l*) *Ibid.* s. 8.
(*ll*) Board of Education Act, 1899, s. 2 (1).
(*m*) 52 & 53 Vict. c. 76.
(*n*) *Ibid.* s. 4; Local Government Act, 1894, s. 21.
(*o*) 52 & 53 Vict. c. 76, s. 1.

amending Act of 1891 (*p*), has been repealed by the Education Act, 1902, provision has been made by that statute (*pp*) for the continuance and development of the schemes started under the Technical Instruction Acts. Parliament grants to each county out of the customs and excise duties severally, a sum which the county council must devote to the purpose of technical education (*q*). The governing body of any institution, established to give technical instruction within the meaning of the Technical Instruction Act of 1889, is empowered to make by-laws and rules for the conduct of the institution, and may hold land. But such institution must be open generally to all persons without qualification (*r*).

III. *Public and Endowed Grammar Schools.*—In the year 1861, a royal commission issued to inquire into the endowments, and generally in the management, of our public schools; and in their report, a variety of changes in the government, management, and studies of these schools were recommended for adoption. A temporary Act (27 & 28 Vict. (1864), c. 92) having been passed, to prevent the acquisition in the meantime of vested interests, a succession of Acts called the Public Schools Acts (*s*) were afterwards passed, to carry into effect the principal changes recommended by the commissioners, of which Acts, the Public Schools Act, 1868 (31 & 32 Vict. c. 118), is the principal. By that statute it was enacted, that the "governing body" which existed at the date of the Act in any of the above schools, might, within the time prescribed by the Act, proceed to make such statutes as they might deem expedient, for determining and establishing the constitution of the future governing body of such school; but

(*p*) 54 Vict. c. 4, s. 1.

(*pp*) Sects. 2, 3, 23.

(*q*) Local Taxation (Customs and Excise) Act, 1890.

(*r*) Technical and Industrial Institutions Act, 1892.

(*s*) 31 & 32 Vict. (1868), c. 118; 32 & 33 Vict. (1869), c. 58; 34 & 35 Vict. (1871), c. 60; 36 & 37 Vict. (1873), c. 41, and c. 62.

that, after such time had expired, all the powers of making statutes with that object should pass to certain "special commissioners" provided for by the Act (*t*). This new governing body was to have power to make regulations with respect to the number of the boys, the mode in which they were to be boarded and lodged, the payments to be made for their maintenance and education, the course of study, the powers to be committed to the head master, and the like (*u*); and was also to have power to make statutes, with regard to a variety of matters connected with the school (*x*), including the privileges, numbers, and rules for admission of boys on the foundation of the school, or who had rights as to education in the school, regulations as to scholarships, exhibitions, and the like, the conditions of the appointment to ecclesiastical benefices vested in the governing body, the number, position, rank, salaries, and emoluments of the masters, and the disposal of the income of the property of the school. Such regulations and statutes, to be so made by the new governing body, require to be submitted for the approval of the special commissioners, and of his Majesty in council (*y*); but the Act provided, that (subject to any vested interests) the head master of every public school to which it applied should be appointed by, and should hold his office at the pleasure of, the new governing body, and that all other masters should be appointed by, and should hold their offices at the pleasure of, the head master (*z*).

With respect to *endowed grammar schools*, being schools in which Latin and Greek or either of such languages are taught (exclusive of the schools to which the Public Schools Acts apply), it was enacted, by an Act passed in the year 1840 (3 & 4 Vict. c. 77), for improving and extending such schools, that, whenever any question came

(*t*) Sect. 5; Act of 1869, s. 1.
(*u*) Act of 1868, s. 12.
(*x*) Sect. 6.
(*y*) Sect. 9.
(*z*) Sect. 13; *Hayman* v. *Governors of Rugby School* (1874), L. R. 18 Eq. 28.

under the consideration of a court of equity, concerning the system of education thereafter to be established in any grammar school, or the right of admission into the same, it should be lawful for that court to make decrees or orders for extending the system of education in the school in question to other useful branches of literature and science, for regulating the right of admission into the school, and for establishing a scheme for the better application of its revenues; paying due regard nevertheless to the intentions of the founders and benefactors, as well as to other circumstances, and, where any special visitor existed, giving him an opportunity to be heard. In many other respects also, this Act placed the management of such schools under the control of the Court of Chancery; and it provided, that the jurisdiction should be exercised on petition, according to the provisions of the Charities Procedure Act, 1812, with regard to charitable trusts (*a*). By the Endowed Schools Act, 1860 (*b*), the trustees or governors of any endowed school were enabled (subject to a variety of exceptions particularized in the Act) to make orders, for the admission to such school of children whose parents were not in communion with the church or sect to which the endowment belonged. But, the relief given by these enactments not being deemed adequate, a royal commission issued in the year 1864 to enquire into the education given in grammar and other endowed schools, proprietary schools and private schools; and, the report of this commission having been in due course laid before parliament, the recommendations of the commissioners have for some time been, and are now being, gradually carried into effect, under the provisions of a group of statutes known as the Endowed Schools Acts, 1869, 1873, and 1874, being respectively the 32 & 33 Vict. c. 56; 36 & 37 Vict. c. 87; and 37 & 38 Vict. c. 87.

Under the provisions of these statutes, there is committed

(*a*) 3 & 4 Vict. c. 77, s. 21. (*b*) 23 & 34 Vict. c. 11.

to the Charity Commissioners the duty of preparing, after such examination or public inquiry as they may think necessary, draft schemes framed in order to render any educational endowment more conducive to the advancement of education (*c*) ; and with this object, these commissioners may, in such schemes, alter and add to any existing trusts, may make new trusts, directions, and provisions in lieu of those previously existing, and may consolidate or divide any two or more endowments (*d*). Such schemes may also contain provisions for altering the constitution, rights, and powers of the governing body of any educational endowment, and for establishing new governing bodies, corporate or unincorporate ; and may remove any governing body, or if it is incorporated, may dissolve such corporation (*e*), it being the duty of the commissioners, in every scheme whereby the privileges or educational advantages of any particular class of persons, or of persons in any particular class of life, shall be abolished or modified, to have due regard to their educational interest (*f*), and, so far as conveniently may be, to extend the benefit of endowments to girls as well as boys (*g*). With regard to the subject of religious teaching, in every scheme (except only such as have reference to schools maintained out of the endowments of any cathedral or collegiate church, or the scholars whereof are required by the founder to be instructed according to the doctrines or formularies of some particular church, sect, or denomination), there is to be inserted a provision, that the parent or guardian, or person liable to the child's maintenance, may claim the exemption of any day scholar from attending prayer or religious worship or instruction (*h*) ; that the religious opinions of any person shall not affect his qualifi-

(*c*) Act of 1869, s. 9 ; *In re Meyricke Fund* (1872), L. R. 7 Ch. App. 500.

(*d*) Act of 1869, s. 9.

(*e*) Sects. 9, 10.

(*f*) Sect. 11 ; Act of 1873, s. 5.

(*g*) Act of 1869, s. 12.

(*h*) Sects. 15, 16.

cation for being one of the governing body (*i*) ; and that he shall not be disqualified for being a master, by reason only of his not being or intending to be in holy orders (*k*). And every scheme is to provide for the dismissal, at the pleasure of the governing body, of every teacher and officer in the school to which the scheme relates, including the principal teacher, with or without a power of appeal, in such cases and under such circumstances as to the commissioners shall seem expedient (*l*).

Any scheme proposed by the commissioners is to be printed and sent to the governing body and to the principal teacher, of the endowment to which it relates ; and is also to be circulated in such other way as the commissioners may think proper, in order to give information to all persons interested (*m*). If any objections to the scheme are made in writing, or any alternative scheme is suggested for consideration, within three months of the publication of the proposed scheme, the commissioners may hold an enquiry concerning the subject-matter of the proposed scheme (*n*), and may submit an approved scheme to the Board of Education, by whom it may be either approved or re-framed, the governing body to which the scheme relates, or any person or body corporate directly affected (*o*), who feels aggrieved by the proposed scheme, being at liberty to present a petition against it to his Majesty in council (*p*).

A petition against a scheme may by Order in Council be referred to the Judicial Committee of the Privy Council, as if it were an appeal (*q*). If no petition is presented within the time limited, his Majesty may by Order in Council declare his approbation without the same being laid before Parliament ; but if a petition has been pre-

(*i*) Sects. 17, 19 ; Act of 1873, s. 6 ; and *In re Hodgson's School* (1878), 3 App. Ca. 857.

(*k*) Act of 1869, s. 18.

(*l*) Sect. 22.

(*m*) Sect. 33.

(*n*) Sect. 35.

(*o*) Sect. 39.

(*p*) *In re Shaftoe's Charity* (1878), 3 App. Ca. 872.

(*q*) Act of 1873, s. 14.

sented, the scheme must be laid before Parliament. If a scheme has lain before Parliament for two months in the same session, and an address from either House praying his Majesty to withhold his consent, has not been presented, the King may declare his approbation (*r*).

IV. *Sites for Schools for the Poor, and for Literary and Scientific Institutions.*—The School Sites Act, 1841, was passed to facilitate the conveyance of sites for schools, and, with the undernoted Acts amending it (*s*), it has provided, that any person legally or equitably entitled in fee simple, in fee tail, or for life in possession, to any lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, may grant by way of gift, sale, or exchange in fee simple, or for term of years, any quantity of such land not exceeding *one acre*, as a site for a school to educate poor persons, or for the residence of the master or mistress of such school, or otherwise for the purposes of the education of poor persons in religious and useful knowledge (*t*). But any such grant, when made by any person entitled for life only, where the person next entitled in remainder in fee simple or in fee tail is legally competent, requires the concurrence of such remainderman; and the grant is in all cases to provide that, upon the land ceasing to be used for the purposes of the grant, it shall revert to the donor (*u*). The like grant may be made by any corporation, ecclesiastical or lay, sole or aggregate, an ecclesiastical corporation sole below the dignity of a bishop obtaining the consent in writing of the bishop of the diocese (*x*); and an allotment may be made for a school site on any inclosure of a common (*y*). By the Schools Sites Act, 1852, the provisions of the School Sites Acts

(*r*) Act of 1873, s. 15.

(*s*) Act of 1844; Act of 1849; Act of 1851; School Grants Act, 1855.

(*t*) Act of 1841, s. 2.

(*u*) *Ibid.*

(*x*) Sect. 11.

(*y*) Inclosure Act, 1845, s. 34. Inclosure Act, 1857, s. 13.

are made applicable to such schools or colleges, for the religious or educational training of the sons of yeomen, tradesmen or others, or for the theological training of candidates for holy orders, as are erected or maintained in part by charitable aid, and in part are self-supporting, ecclesiastical corporations (as regards such grants) being restricted to schools or colleges in union with the Established Church; and by the Elementary Education Act, 1870, these provisions were also made applicable to the public elementary schools already treated of in this chapter (z).

By the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), it is provided, that the same facilities as are afforded by the School Sites Acts, in respect of schools for poor persons, shall also be available in respect of such institutions, subject to the like provisions as are applicable to sites for schools. The Act contains also a variety of other provisions with reference to these institutions, relating chiefly to the persons by and to whom, and the manner in which, conveyances of these sites may be made, and as to the form of such conveyances; to the subsequent sale or exchange of the land conveyed; to the liability of the grantees to rates, taxes, and other charges and expenses; to the manner in which the personal property of the institution shall be invested; to the manner in which actions by or against the institution may be brought, and in which judgment therein shall be satisfied; to the power of making by-laws, enforceable in the county court of the district; to the liability of individual members to be sued or prosecuted in matters affecting the property of the institution; and to the manner in which the institution may effect an alteration, extension, or abridgment of the purposes for which it was established, or may effect its own dissolution, or the adjustment of its affairs.

The provisions for the acquisition of school sites and the

(z) 33 & 34 Vict. c. 75, s. 20.

like, are additional to the provisions contained in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6, whereby land may be conveyed for similar purposes by deed (to any extent) and by will (to the extent of twenty acres for a public park, two acres for a public museum, and one acre for a schoolhouse), the conveyance, if by deed, being executed twelve calendar months before the death of the donor, and being enrolled in the books of the Charity Commissioners within six months after the date from which the gift operates.

Finally, under the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), s. 7, sites for such institutions may, to an extent not exceeding two acres, be freely granted by limited owners, with the consent of the next remainderman, or else with the sanction of the Court; and every such grant is to be forthwith enrolled with the Charity Commissioners (sect. 10).

V. *Pauper Schools.*—The first class of persons to receive education at the public expense were the pauper children maintained in the workhouses. Children who were maintained by the parish under the Poor Law were educated in the workhouses after 1834, in accordance with rules made by the Poor Law Commissioners, until power was given to the commissioners, by the Poor Law Amendment Act, 1844, s. 40, to assist in the separation of children from the other pauper inmates by the union of parishes into school districts, in which schools might be established for the reception of the infant poor. Under the provisions of this last-mentioned Act (as amended by the Poor Law (Schools) Act, 1848, and the Poor Law Amendment Acts, 1850 and 1868), parishes and unions may be combined into *school districts*, for the instruction of such of their chargeable infant poor (not being above the age of sixteen) as are orphans, or deserted by their parents, or whose parents or guardians consent to their being placed in such schools; and (by s. 42) a board of

managers, consisting of members chosen from the ratepayers of the district, is constituted for every such school district. The Poor Law (Certified Schools) Act, 1862 (*a*), enables the guardians of any parish or union to send any poor child, (being an orphan or deserted, or else with the consent of his or her parents,) to any school certified as fit for the purpose, supported wholly or in part by voluntary subscriptions, (but not to a reformatory school nor to a school conducted on principles contrary to the particular religious sect or persuasion to which the child may belong,) provided the school managers are willing to receive the child; and also authorizes them to pay the expenses incurred for the maintenance, clothing, and education of the child at such school, out of the funds in their possession, to the extent, at least, of what the child's maintenance in the workhouse would have cost them during the same period. In the case of the children of persons in receipt of out-door relief, payment of school fees by the guardians was provided for by 18 & 19 Vict. (1855) c. 34 (commonly called Denison's Act). This was repealed by the Education Act (1873), which Act in turn was repealed in this respect, by the Elementary Education Act, 1876. Free education is, however, now provided by the Elementary Education Act, 1891, before referred to, for all children. It is the duty of the school authority to provide efficient elementary education for blind and deaf children not resident in a workhouse or boarded out (*b*). Such children may also be sent to suitable institutions by the guardians in whose workhouse they are, or by whom they have been boarded out, under the Poor Law (Certified Schools) Act, 1862, already referred to.

VI. *Reformatory Schools.*—Reformatory Schools are schools for "the better training of youthful offenders." The principal statute regulating these institutions is the

(*a*) 25 & 26 Vict. c. 43.

(*b*) Elementary Education (Blind and Deaf Children) Act, 1893.

Reformatory Schools Act, 1866 (*c*), which repeals certain earlier Acts on the same subject, and which has been amended by the Reformatory and Industrial Schools Act, 1891, and the Reformatory Schools Act, 1893. Under these statutes, the Secretary for the Home Department, upon application made to him by the managers of any reformatory school, is empowered to direct an inspector of prisons (styled the Inspector of Reformatory Schools) to examine into the condition and regulations of such school; and (in case the inspector reports in its favour) the school may be certified as being fit for the reception of youthful offenders (*e*). A youthful offender is a person who is in the opinion of the court, by whom he is convicted of an offence punishable with penal servitude or imprisonment, less than sixteen years of age, and either appears to the court to be not less than twelve years of age or is proved to have been previously convicted of an offence punishable with penal servitude or imprisonment (*f*). The court may, in addition to, or in lieu of, sentencing him according to law to any punishment, order his detention in a certified reformatory school, for a period of not less than three nor more than five years, "so, however, that the period is such "as will . . . expire at or before the time at which the "offender will attain the age of nineteen years" (*g*). The Home Secretary may also at any time order the particular offender to be discharged from the school to which he has been sent; or may direct the removal of any scholar from one school to another (*h*). All the expenses incident to this treatment of juvenile offenders are to be defrayed, to the extent of five shillings per week, by the parent or other person liable for the maintenance of the child (if he or she is of sufficient ability) (*i*); but the commissioners of the treasury may contribute, out of money in that behalf provided by parliament, such sum as the Home Secretary

(*c*) 29 & 30 Vict. c. 117.
(*e*) Act of 1866, s. 4.
(*f*) Act of 1893, s. 1.
(*g*) *Ibid.*
(*h*) Act of 1866, s. 17.
(*i*) *Ibid.* s. 25.

may recommend, towards the expenses of any certified reformatory school (*k*), and the prison authorities may also contribute towards these expenses, but subject in general to the previous approval of the Home Secretary (*l*). The establishment and maintenance of, and the contribution to, reformatory schools is, however, now made part of the business transferred by the Local Government Act, 1888 (*m*), s. 3, from Quarter Sessions to the County Councils.

VII. *Industrial Schools.*—Industrial schools are schools in which industrial training is provided, and in which children are lodged, clothed, and fed, as well as taught (*n*). These schools are established under statutes which are not punitive in character, but are intended to protect the children who come within their scope (*o*). The Industrial Schools Act, 1866 (*p*), which repealed the Industrial Schools Act, 1861 (24 & 25 Vict. c. 113), enables the Home Secretary, upon the application of the managers of any industrial school, to direct an examination to be made by the Inspector of Reformatory Schools (who is also to be the inspector of industrial schools) into the condition of the industrial school (*q*); and he may then grant a certificate constituting the same a certified industrial school within the meaning of the Act (*r*). To such school the following classes of children may be sent, that is to say,—any child (not previously convicted of felony) who, being apparently under the age of *twelve*, is charged before two justices or a stipendiary magistrate with having committed an offence punishable by imprisonment, or with some less punishment; any child who, being apparently under the age of *fourteen*, is brought before such justices or stipendiary as having been found begging or receiving alms, or as having been found in any street or public

(*k*) Sect. 24.

(*l*) Sect. 28.

(*m*) 51 & 52 Vict. c. 41, ss. 3, 38.

(*n*) Industrial Schools Act, 1866, s. 5.

(*o*) *Per* Lord Russell of Killowen (*R.* v. *Jennings*, [1896] 1 Q. B. at p. 66).

(*p*) 29 & 30 Vict. c. 118.

(*q*) *Ibid.* s. 6.

(*r*) Sect. 7.]

place for such purpose, or as having been found wandering without any home or settled place of abode, or proper guardianship, or visible means of subsistence, or as having been found destitute (either being an orphan, or having a surviving parent who is undergoing penal servitude or imprisonment), or found frequenting the company of reputed thieves (*s*) ; any child whose parent, step-parent, or guardian represents to such justices or stipendiary that the child is not amenable to his control, and that he desires him to be sent to such a school (*t*) ; any child whose mother has been convicted of a crime (a previous conviction for crime having been proved against her), and who, being under her care and control at the time of her conviction for the last of such crimes, has no visible means of subsistence or is without proper guardianship (*u*), or who is lodging in a house with, or frequents the company of, prostitutes (*x*). The justices or stipendiary magistrate before whom such a child is brought may, if satisfied, send the child to a certified industrial school, the managers of which shall be willing to receive him (*y*), but not so as to extend the period of detention beyond the time when the child shall attain the age of sixteen, beyond which age he cannot be detained except with his own consent in writing (*z*). The Act requires that, if possible, a school shall be selected which is conducted in accordance with the religious persuasion to which the parent may belong ; and a minister of such persuasion may visit the child and instruct him in religion (*a*). The parent, or other person legally liable, may be ordered to pay a weekly sum, not exceeding five shillings, for the expenses of the child's maintenance and training at the school (*b*) ; and, on the recommendation of the Home

(*s*) Sect. 14.
(*t*) Sect. 16.
(*u*) Prevention of Crimes Act, 1871, s. 14.
(*x*) Industrial Schools Acts Amendment Act, 1880.
(*y*) Act of 1866, s. 14.
(*z*) Sects. 18, 41.
(*a*) Sect. 25.
(*b*) Sects. 39, 40. See also Youthful Offenders Act, 1901, ss. 6, 7.

Secretary, funds for the custody and maintenance of children detained in certified industrial schools, may be contributed, by the treasury, out of moneys in that behalf provided by parliament (*c*), and poor law guardians, prison authorities, and local education authorities, may, with the approval of the Home Secretary, contribute to these expenses (*d*). Instead of sending children to industrial schools, the justices may, however, now commit the custody of the children to their relatives or other fit persons, under the Prevention of Cruelty to Children Act, 1894 (*e*).

Finally, it may be added, that the local education authority under the Elementary Education Acts may, with the sanction of a secretary of state, establish and maintain an industrial school, or (in a proper case) a *day* industrial school (*f*); and a child whose parent has disobeyed an "attendance order" made under the Elementary Education Act, 1876 (*g*), may be sent to such industrial school. The business formerly done by the quarter sessions or any committee with regard to the establishment and maintenance of, and the contribution to industrial schools, is now made part of the business transferred by the Local Government Act, 1888 (*h*), to the county councils.

(*c*) Sect. 35.

(*d*) Sects. 12, 37; Elementary Education Act, 1870, s. 27; 1873, s. 14; Youthful Offenders Act, 1901, s. 9.

(*e*) 57 & 58 Vict. c. 41, s. 9.

(*f*) Elementary Education (Industrial Schools) Act, 1879.

(*g*) 39 & 40 Vict. c. 79, ss. 11, 14, 16.

(*h*) 51 & 52 Vict. c. 41, ss. 3, 38.

CHAPTER X.

OF THE LAWS RELATING TO PUBLIC CONVEYANCES.

It has in modern times been the policy of the legislature of this country to provide for a general supervision of public conveyances, partly by direct statutory rules, partly by empowering government departments to regulate and inspect, partly by authorising local authorities, more particularly county and borough councils, to make by-laws. Until recently Parliament trusted entirely to private enterprise to improve the means of conveying goods and passengers. Only during the last quarter of a century have local authorities begun to acquire and work tramways, light railways, road engines, and, in some few instances, omnibuses. The subject of public conveyances will be considered under five heads, viz.: (I.) Hackney Carriages or Cabs, and Stage Carriages; II. Steam Conveyances and Motor Cars; (III.) Tramways; (IV.) Railways; and (V.) Conveyances by Water.

I. *Hackney Carriages (or Cabs), and Stage Carriages (or Omnibuses).*—The Acts regulating cabs in the metropolis, beginning with the London Hackney Carriage Act of 1831, and ending with the London Cab Act, 1896, are enumerated in the note below (*a*). In towns outside the metropolis these vehicles are governed by private Acts

(*a*) 1 & 2 Will. 4 (1831), c. 22; 3 & 4 Will. 4 (1833), c. 48; 6 & 7 Vict. (1843), c. 86; 13 & 14 Vict. (1850), c. 7; 16 & 17 Vict. (1853), cc. 33, 127; 30 & 31 Vict. (1867), c. 134; 31 & 32 Vict. (1868), c. 5; 32 & 33 Vict. (1869), c. 115 (which defines the hackney carriage (s. 4)); 54 & 55 Vict. (1891), c. 76; 59 & 60 Vict. (1896), c. 27.

incorporating the Town Police Clauses Act, 1847 (*b*), which, however, contains provisions very similar to the London Acts. Non-metropolitan boroughs and urban districts are also subject to police regulations and by-laws made under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 171, 172, which incorporates the provisions of the Town Police Clauses Act with regard to hackney carriages. A hackney carriage is defined to mean, or rather, is described as including, "every wheeled carriage, "whatever be its form or construction, used in standing "or plying for hire in any street within the prescribed "distance, and every carriage standing upon any street "within the prescribed distance, having thereon any "numbered plate required by this or the special Act to be "fixed upon a hackney carriage, or having thereon any "plate resembling or intending to resemble any such plate "as aforesaid." Any such carriage is licensed by and is subject to the by-laws of the urban authority in whose district it is stationed. By the Town Police Clauses Act of 1889 (which is also incorporated in the Public Health Acts) the provisions of the earlier Act as regards hackney carriages are applied with modifications to every omnibus, char-à-banc, waggonette, brake, and stage coach plying for hire. By-laws, however, cannot be made with respect to omnibuses or "stage carriages." A stage carriage is any carriage drawn by animal power, conveying passengers for hire with separate fares for separate passengers, and travelling at the rate of more than three miles an hour. Any person who keeps such a carriage must have a licence from the Board of Inland Revenue, which must be yearly renewed, and in respect of which certain duties are made payable by the Stage Carriages Act, 1832 (*c*). There must be on the carriage such numbered plates and particulars as are directed by the Acts; specifying the

(*b*) 10 & 11 Vict. c. 89, ss. 37—49, 51—68.

(*c*) 2 & 3 Will. 4, c. 120; Revenue Act, 1869, s. 39.

Christian name and surname of the proprietor, or of one of the proprietors, the extreme places to which the licence extends, and the greatest number of inside and outside passengers which the carriage may lawfully convey (*d*). *Mail* coaches, in particular, are the subject of further special regulations (*e*). The Acts also impose penalties on persons in charge of these carriages, for offences or acts of negligence which militate against the safety or convenience of the public, *e.g.*, driving a stage coach without a licence, or with a defective licence, or without having the plates and particulars above referred to (*f*) ; carrying too many passengers, or too much luggage (*g*) ; intoxication, negligence, or furious driving (*h*) ; and in short, any misconduct, either in the driver or in the conductor, which shall endanger the safety or the property of any person, or even seriously inconvenience him (*i*). Furious driving or racing (whether by a stage carriage or by any other carriage), if attended with any personal injury, is a misdemeanor even by the common law (*k*). The Acts further provide, that where the driver, conductor, or guard of a stage carriage, who has committed the offence, is not known, or cannot be found, the *proprietor* shall be liable to the penalty (*l*), unless he prove (by evidence other than his own testimony), that the offence was committed without his privity or knowledge, and without any benefit therefrom to himself, and that he has used his best

(*d*) Stage Carriages Act, 1832 ; Railway Passenger Duty Act, 1842.

(*e*) Revenue Act, 1869.

(*f*) Act of 1832, s. 36 ; Railway Passenger Duty Act, 1842, s. 14 ; Revenue Act, 1869, s. 39.

(*g*) London Hackney Carriages Act, 1833, s. 4 ; Railway Passenger Duty Act, 1842, s. 15.

(*h*) Act of 1832, s. 48.

(*i*) *Ex parte Kippins*, [1897] 1 Q. B. 1.

(*k*) Offences Against the Person Act, 1861, s. 35 ; and see Highways and Locomotives (Amendment) Act, 1878 ; and (as to *bicycles*, &c.) Local Government Act, 1888, s. 85 ; and (as to *omnibuses*) Town Police Clauses Act, 1889.

(*l*) Act of 1832, s. 49 ; London Hackney Carriages Act, 1843, s. 35 ; Cruelty to Animals Act, 1849, s. 22.

endeavours to find out the offending driver, conductor, or guard (*m*).

II. *Locomotives and Motor Cars.*—A *light locomotive* within the meaning of the Locomotives on Highways Act, 1896, is a carriage (including a motor car) which weighs, unladen, less than three tons. Its maximum legal speed is fixed by the Regulations of the Local Government Board, but must not exceed fourteen miles an hour. The *licensed locomotives* and *registered locomotives* which are provided for by the Locomotives Act, 1898, are regulated by the specific provisions contained in that Act, which amends the law so as to enable borough and county councils to "permit any "waggons drawn or propelled by a locomotive on the "highway to carry weights in excess of those mentioned in "section 4 of the Locomotive Act, 1861." The use of locomotives on highways may also be regulated and restricted by local by-laws. If the owner of a locomotive is aggrieved by a restriction or prohibition placed on the passing of any locomotive over a bridge, he may appeal to the Local Government Board (Locomotives Act, 1898, s. 7) (*n*).

III. *Tramways and Light Railways.*—Tramways and light railways are not necessarily distinguishable by the eye. The difference is a purely legal one, and can only be solved by finding out whether the undertaking in question was constructed under the provisions of the Tramways Act, 1870 (33 & 34 Vict. c. 78), or under the Light Railways Act, 1896 (59 & 60 Vict. c. 48), and the rules made under that Act by the Board of Trade. Light railways, however, are not necessarily run on public highways, and may closely resemble an ordinary railway, from which again they may be distinguished in law by reason of their being constituted by a Board of Trade

(*m*) Act of 1832, s. 49.

(*n*) See (regarding *steam carriages* or *locomotives*) 24 & 25 Vict. (1861), c. 70; 28 & 29 Vict. (1865), c. 83 (continued by 2 Edw. 7 (1902), c. 32); 41 & 42 Vict. (1878), c. 77, Pt. II.; 59 & 60 Vict. (1896), c. 36; and 61 & 62 Vict. (1898), c. 29.

Order under the Act of 1896. For details of the law relating to tramways and light railways, as well to their promotion as to their management, the student is referred to the Acts above mentioned.

IV. *Railways.*—These are usually constructed (and to some extent regulated) under the provisions of special Acts from time to time passed for the purpose; but these special or private Acts have certain features in common, as they usually incorporate the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and (in the case of special Acts passed after July, 1863), the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92). But there are also general Acts passed for the purpose of securing a greater uniformity in the administration of railways, and of safeguarding the interests and security of the public against the private and possibly conflicting interests of shareholders in railway companies. Among these special mention may be made of the Railway Regulation Acts, 1840 to 1893, and the Railway and Canal Traffic Acts, 1854 to 1894. The year 1845 is a very important one in the history of the law of railway construction, for besides the Railways Clauses Consolidation Act, there were passed in that year the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), which consolidated the provisions usually inserted in private Acts incorporating companies (like railway companies) engaged in work of a public nature, and also the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), which consolidated the general provisions applicable to the acquisition of land for such purposes, and the compensation to be paid.

The legislature has entrusted the general supervision and regulation of all railways to the Board of Trade; but by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 10, certain of the powers and duties of the Board of Trade in relation to railways were transferred to a new body called the Railway Commissioners. This

process was continued under the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), and at the same time the name of the commission was changed to that of the Railway and Canal Commission. The last-named body is a court of record, and consists of two commissioners appointed by the President of the Board of Trade, and of three *ex officio* commissioners, each of whom must be a judge of a superior court. The commission has large powers and jurisdiction under various Acts. There is a right of appeal, but only on questions of law, from the commission to the Court of Appeal. Under the provisions of the specified Railway Acts, it is made unlawful to open any railway, or portion of a railway, for the public conveyance of passengers, until one month's notice in writing shall have been given to the Board of Trade of the intention of the company to open the same for traffic, and ten days' notice of the time when the railway will be complete and ready for their inspection must also be given to the Board; and the Board may postpone the opening of any railway, until satisfied that the public may use the same without danger (*o*). In execution of its general control of railways, the Board orders every railway company to make returns to it of its capital, traffic, and working expenditure; of the occurrence of any serious railway accidents; and of all tolls and rates from time to time levied (*p*); and the Board appoints proper persons as inspectors of railways (*q*). Moreover, every railway company (whether specially called upon to do so or not) must report to the Board of Trade every accident attended with serious personal injury, within forty-eight hours of its occurrence (*r*); and is required to lay before the

(*o*) Railway Regulation Acts, 1842, ss. 4, 6; 1873, s. 6. The discretion of the Board is absolute (*Att.-Gen.* v. *Great Western Railway Company* (1877), 4 Ch. D. 735).

(*p*) Act of 1871, ss. 9, 10; Act of 1873, s. 4; Act of 1878; Act of 1888, s. 32.

(*q*) Act of 1871.

(*r*) *Ibid.* As to investigation by the Board of Trade into the causes of accidents, see ss. 3—8.

Board, for its approbation, certified copies of the by-laws and regulations by which it is governed (*s*), which by-laws may be either sanctioned or disallowed by the Board at its pleasure. And the Board may direct the attorney-general to proceed against any railway company, for non-compliance with the provisions either of its special Act or of any of the general Acts regulative of railways, or for any unlawful act whatsoever (*t*).

A company is not bound to act as a common carrier, unless its own statutes so provide in accordance with section 89 of the Railways Clauses Consolidation Act, 1845. But a railway company must afford reasonable facilities for the carriage of passengers and goods, and can only limit its liability as carrier by conditions which are reasonable (*u*).

The Railway Acts contain also provisions authorizing the summary apprehension and punishment of engine-drivers, and other servants of the company, guilty of any misconduct (*x*); and subjecting to punishment all ill-disposed persons obstructing or injuring any railway engine or carriage, or endangering the safety of the passengers (*y*). And, under the provisions of the general Acts, railway companies (amongst other obligations) are required to maintain and keep in repair good and sufficient fences along their lines; to transport, at a settled rate, military and police forces and mails; to afford all reasonable facilities for the conveyance of traffic, without any undue preference of particular persons or companies, or of particular descriptions of traffic; to permit and facilitate the introduction of electric telegraphs upon their lines; to keep accounts of the money received for the conveyance of passengers, or from other sources, upon their respective

(*s*) Act of 1840, ss. 7, 8.

(*t*) Act of 1844, ss. 17, 18.

(*u*) Railways Clauses Act, 1845, s. 89; Railway and Canal Traffic Act, 1854, s. 7.

(*x*) Act of 1840, ss. 13, 14; Act of 1842, ss. 17, 18.

(*y*) Malicious Damage Act, 1861, ss. 35—38; Offences Against the Person Act, 1861, ss. 32—34.

lines, and to deliver copies of such accounts to the Board of Inland Revenue ; and to pay a monthly duty on their receipts (*z*).

By one of the statutes above mentioned, viz., the Railway Regulation Act, 1844, it was provided, that if, at any time after twenty-one years from the passing of the special Act for any passenger railway established after the year 1844, the average divisible profits for three successive years, upon the paid-up capital stock of such passenger railway company, should be found to equal or exceed 10*l.* per cent., the lords of the treasury should be at liberty, (an Act of Parliament being first obtained for that purpose,) to revise and reduce the fares, upon condition of giving the company a guarantee to make good their profits to the amount of 10*l.* per cent. during the existence of such reduced scale ; or the treasury might purchase the railway, whatever might be the rate of divisible profits earned thereon (*a*). And this right of purchase was subsequently extended to telegraphs (*b*). The same Act also required railway companies in general to secure, to the poorer class of travellers, the means of travelling by cheap trains, *i.e.*, at moderate fares, and in carriages protected from the weather (*c*).

The Companies Clauses Consolidation Act, 1845, ss. 38—55, as amended by the Mortgage Debentures Acts, 1865 and 1870, contains numerous regulations with regard to railway companies borrowing money on bond or mortgage (*d*) ; and provision has been made, by the Railway Companies Act, 1867, with regard to the financial arrangements of insolvent railway companies, as well for the protection of

(*z*) Railway Passenger Duty Act, 1842, s. 4 ; Cheap Trains Act, 1883, s. 7.

(*a*) 7 & 8 Vict. c. 85, ss. 1—4.

(*b*) Telegraph Act, 1868.

(*c*) The fare for third-class passengers, by these cheap or *government* trains, is not to exceed *one penny* per mile (Cheap Trains Acts, 1858 ; 1883, s. 3).

(*d*) Forms of bond and mortgage deed are in the schedules to the Act of 1845.

their creditors on the one hand, as for the protection of their shareholders on the other (*e*) ; and the Regulation of Railways Act, 1868, which deals with the accounts of railway companies, provides for the protection of the shareholders, by inspection of such accounts, and by a proper system of audits.

This latter Act contains also provisions for furthering the safety and comfort of railway travellers, and (among others) an important regulation, that in every passenger train which travels more than twenty miles without stopping, there shall be provided such sufficient means of communication, between the passengers and the servants of the company in charge of the train, as the Board of Trade shall approve (*f*).

It should be added—for the subject of preferential rates is at present greatly occupying the public mind—that, apart from the common law, English railway legislation contains many provisions against undue preferences. And in particular the Railway and Canal Traffic Act, 1854, s. 2 (17 & 18 Vict. c. 31), provides that no railway or canal company shall give undue or unreasonable advantage to favour any particular person or any particular description of traffic. And the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 28, extends the provision to vessels belonging to or chartered by the railway company.

V. *Conveyances by Water*, that is to say, the carriage of passengers in merchant ships generally, being either steamers or sailing vessels ; particular rivers (*e.g.*, the Thames) having their own particular regulations (*g*). The general law with regard to merchant shipping is contained in the Merchant Shipping Acts, 1894 to 1900.

First, *as to Steamers.*—The Merchant Shipping Act, 1894, continuing the like provisions contained in the

(*e*) Cf. *In re Potteries, Shrewsbury, and North Wales Railway Company* (1869), L. R. 5 Ch. App. 67.

(*f*) Sect. 22.

(*g*) 22 & 23 Vict. (1859) c. cxxxiii.

earlier Acts referred to in the chapter on Navigation (*h*), provides, that every "passenger steamer,"—being any "British steam-ship carrying passengers to, from, or "between any place or places in the United Kingdom "(excepting steam ferry-boats working on chains, com-"monly called steam bridges), or any foreign steam-ship "carrying passengers between places in the United King-"dom" (*i*),—which shall carry a greater number of passengers than twelve, shall be surveyed by, and reported upon to, the Board of Trade at least once in every year (*k*); and shall proceed on no voyage with passengers, unless the owner or master has received from the Board a certificate applicable to the voyage, and showing that the provisions of the Act have been complied with (*l*). In case the captain or person in charge receives on board any number of passengers greater than the number allowed by the certificate, the owner or master is made liable to pecuniary penalties. And the master of every such ship carrying passengers between places in the United Kingdom must, when navigating within the limits of any district for which pilots are licensed, (unless he or his mate has a certificate enabling him to conduct the vessel himself,) employ a qualified pilot; and, if he fails to do so, he is liable to a penalty not exceeding 100*l*. (*m*). We shall see that the masters of all foreign-going vessels and of home-trade passenger ships must have certain certificates of competency or of service (*n*); and wherever such certificate is necessary, then the vessel or ship, if a steamer, is to have also on board a certificated engineer or engineers.

Secondly, *as to Passenger Ships generally, otherwise called Emigrant Ships.*—The Passengers Acts, 1855, 1863,

(*h*) See *post*, pp. 160—163. See also the Chinese Passengers Act, 1855 (18 & 19 Vict. c. 104).

(*i*) Merchant Shipping Act, 1894, s. 267.

(*k*) *Ibid.* s. 271.

(*l*) *Ibid.*

(*m*) *Ibid.* s. 604; *The Hanna* (1866), L. R. 1 Adm. & Ecc. 283.

(*n*) *Post*, p. 168.

1872, and 1876 (being respectively the 18 & 19 Vict. c. 119, 26 & 27 Vict. c. 51, 35 & 36 Vict. c. 73, and 39 & 40 Vict. c. 80), extended to every sea-going vessel, whether British or foreign, which carried more than *fifty* passengers (*o*), from the United Kingdom to any place out of Europe, and not being within the Mediterranean Sea (*p*); and the execution of the Acts was committed to the Board of Trade (*q*), or (in her Majesty's possessions abroad) to the officers there specially appointed for the purpose, and (in their absence) to the chief customs officer of the place (*r*). But all the specified Acts (save some few sections of the Act of 1872) have now been repealed, and their provisions re-enacted with amendments, by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). The last-mentioned Act, after defining an emigrant ship as "every sea-going ship, whether British or foreign, and "whether or not conveying mails, carrying more than "fifty *steerage* passengers" (or more such passengers than according to a certain proportion of the ship's registered tonnage for each statute adult) (*s*), provides :—that no such ship (unless it be a duly certificated passenger *steamer*) shall clear out to sea, until duly surveyed and reported seaworthy (*t*); nor until the master shall have obtained, from the proper authority at the port of clearance, a certificate that the requirements of the Act have been duly complied with, and that the ship is seaworthy, in safe trim, and in all respects fit for her voyage, and her passengers and crew in a fit state to proceed (*u*); nor until the master shall have joined in a bond to the Crown

(*o*) 26 & 27 Vict. (1863), c. 51, s. 3.

(*p*) 18 & 19 Vict. (1855), c. 119, s. 4.

(*q*) 35 & 36 Vict. (1872), c. 73, s. 5.

(*r*) Passengers Act, 1855, ss. 8, 9.

(*s*) Merchant Shipping Act, 1894, s. 268. The main Act has itself been amended, and the collective title now is, under the Act of 1900, s. 5, "The Merchant Shipping Acts, 1894 to 1900."

(*t*) *Ibid.* s. 289.

(*u*) *Ibid.* s. 314.

in the sum of 2,000*l.* or (where neither the owners nor the charterers reside in the United Kingdom) in the sum of 5,000*l.*, conditioned, *inter alia*, for the seaworthiness of the vessel (*x*). The Act contains also a great many provisions for limiting the number and ensuring the safety and accommodation, health and welfare, of the passengers (*y*), and for regulating *colonial* voyages, as defined in sect. 366 of the Act: but, with regard to vessels plying between ports in Australasia, the Governor of the colony from which the vessel proceeds is also authorized to make the proper regulations. Further, it may be observed that, although any British subject who commits an offence on any British ship may be tried in a British court in whose jurisdiction he is found, the laws of the Australian Commonwealth are in force "on all British " ships, the king's ships of war excepted, whose first port " of clearance and whose port of destination are in the " Commonwealth" (*z*). The Act of 1894 further provides, that the master of every ship bringing steerage passengers into the United Kingdom, from any place out of Europe, and not within the Mediterranean Sea, shall, within twenty-four hours after arrival, deliver to the proper authority a correct list, under his signature, specifying the names, ages, and callings of all the steerage passengers embarked, and the ports from whence they came: and which of them (if any) have died, with the supposed cause of death, or have been born, during the voyage. And if the master shall fail to deliver such list, or it be wilfully false, he incurs a penalty not exceeding 50*l.* (*a*): and if any ship bringing steerage passengers into the United Kingdom from any place out of Europe, and not within the Mediterranean Sea, has on board a

(*x*) Act of 1894, s. 309.

(*y*) *Ibid.* ss. 291–308.

(*z*) Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12).

(*a*) Merchant Shipping Act, 1894, s. 336.

greater number of steerage passengers than is allowed by the Act for passengers *from* the United Kingdom, the master is liable to a fine not exceeding 10*l.* for every "statute adult" constituting such excess (*b*). In 1899 an Act (62 & 63 Vict. c. 23) was passed "to simplify and "amend the law relating to the testing and sale of anchors "and chain cables," under which all persons are prohibited from selling chain cables or anchors weighing more than 168 lbs., unless they have been previously tested by testers duly licensed under the Act.

(*b*) Merchant Shipping Act, 1894, s. 337.

CHAPTER XI.

OF THE LAWS RELATING TO NAVIGATION, AND TO THE MERCANTILE MARINE.

In attempting to make a concise statement of the laws relating to Navigation and Merchant Shipping, we shall distribute our statement under the following heads :—

(I.) The Laws relating to Navigation ; (II.) The Laws relating to the Ownership, Registration, and Transfer of Merchant Ships : (III.) The Laws relating to Merchant Seamen : (IV.) The Laws relating to Pilotage : (V.) The Laws relating to Lighthouses, Beacons, and Seamarks : (VI.) The Laws relating to the Liability of Shipowners for loss or damage : and (VII.) The Laws relating to Fishing Boats and to Fisheries.

I. *The Laws relating to Navigation.*—Until the year 1825, this subject was in the main regulated by [the Navigation Act of 12 Charles II. (1660), c. 18, an Act the provisions of which in a more rudimentary form had been first framed in 1650 (*a*), in the time of the Long Parliament. These provisions (it is said) were framed, with the object of dealing a blow at our own sugar islands, which were disaffected to the Parliament, and still held out for Charles II., by stopping or crippling their trade with the Dutch (*b*) : and with the object also of clipping the wings of those our opulent and enterprising neighbours. With these objects in view, this law prohibited all ships of foreign nations from trading with any English plantation without a licence from the council of state. In 1651, the

(*a*) Scobell, 132. (*b*) *Mod. Univ. Hist.* xii. 289.

[prohibition was extended also to ships trading with the mother country ; consequently, no goods were suffered to be imported into England, or into any English dependency, in any other than English bottoms, or in the ships of that European nation, of which the merchandize imported was the genuine growth or manufacture. At the Restoration, these baleful provisions were continued, by the Navigation Act just mentioned, with, however, this beneficial provision added thereto, namely, that the master and three-fourths of the seamen should be English ; the object being to encourage, by the exclusion of foreign competitors, the ships, seamen, and commerce of Great Britain.]

In the reign of King George the Fourth, both the Navigation Act of 1660, and all other navigation Acts then in force, were repealed, and a new system of regulations was established (*c*) ; and the new system was afterwards amended by various statutes passed in the reign of King William the Fourth (*d*), and in the earlier part of the reign of Queen Victoria (*e*). But the new system, or any of the amendments thereof, did not involve any material departure from the policy of encouraging our own mercantile marine and commerce, by prohibitions of the like nature in general to those above described. More recently, however, under the influence of the doctrines commonly designated as those of "free trade" (*f*), a new course of legislation (commencing with the 12 & 13 Vict.

(*c*) 6 Geo. 4 (1825), c. 105.

(*d*) 3 & 4 Will. 4 (1833), cc. 54, 55, 59.

(*e*) 8 & 9 Vict. (1845), cc. 88, 89, 93.

(*f*) In his *Wealth of Nations*, vol. ii. p. 194, Adam Smith (who may be called the father of "free trade") considered, that the Act of Navigation "was not favourable "to the growth of that opulence "which should arise from foreign "commerce. For that a nation "will be most likely to buy cheap, "when by the most perfect free-"dom of trade it encourages all "nations to bring to it the goods "which it has occasion to pur-"chase ; and a nation will be "most likely to sell dear, when "its markets are thus filled with "the greatest number of buyers."

(1849), c. 29) was entered upon, and has been since consistently pursued; until at length the old system of prohibition, which latterly had come to be confined only to the coasting trade of the United Kingdom and of the Channel Islands (*g*), has been relinquished altogether, except only as regards the trade from one part of any British possession in Asia, Africa, and America, to another part of the same possession. As to this latter trade, the law still is, that it shall not be carried on except in British ships (*h*), though, upon an address from the legislature of any such possession, praying that the conveyance of goods or passengers may take place, as far as they are concerned, free from such restrictions, his Majesty is empowered to authorize the same by Order in Council, on such terms as he may think fit (*i*). In all other respects, foreign vessels are now generally allowed a free commercial intercourse with this country and its dependencies, upon terms of perfect equality with our own vessels—a concession qualified, however, in the first instance, by some very important provisions, tending to confine such intercourse to such nations as consented, on their part, to concede to us a reciprocal and equal freedom. For, by the Customs Consolidation Act, 1853, ss. 324—326, it was enacted, that if British vessels were subjected, in any foreign country, to any *prohibitions* or *restrictions*, as to the voyages in which they might engage or the articles which they might import or export, her Majesty might, by Order in Council, impose corresponding prohibitions and restrictions upon the ships of such foreign country; and further, that if British ships were directly or indirectly subjected, in any foreign country, to *duties or charges* from which the national vessels of such country were exempt, or if any duties were imposed there upon articles imported or

(*g*) 12 & 13 Vict. c. 29; 17 & 18 Vict. (1854), c. 5; Supplemental Customs Consolidation Acts, 1855.

(*h*) Customs Consolidation Act, 1853, s. 163.

(*i*) Sect. 328.

exported in British ships, which were not equally imposed upon the like articles in national vessels ; or if *any preference whatsoever was shown*, either directly or indirectly, to vessels of such country over British vessels, or to articles imported or exported in the former, over the like articles imported or exported in the latter ; or if British trade and navigation were not placed by such foreign country on *as advantageous a footing as the trade and navigation of the most favoured nation*,—then, in any of these cases, her Majesty might, by Order in Council, impose such duties of tonnage upon the ships of such foreign nations, or such duties on goods imported or exported in its ships, as would countervail the disadvantages to which British trade or navigation was subjected. And these provisions still remain substantially in force, notwithstanding that the Customs Consolidation Act, 1853, has been now in great part repealed (*k*).

The next five of the subjects enumerated at the outset of this chapter are in the main regulated by the Merchant Shipping Act, 1894, which now supersedes and consolidates the provisions contained in a series of Acts called "Merchant Shipping Acts, 1854 to 1892"; and with regard to all these matters, they are (by sect. 713) placed under the general superintendence of that committee of the privy council which is commonly described as the Board of Trade. It will be necessary, however, to treat of these five subjects separately, each in its due order, though only in such general and concise manner as the nature of this treatise permits. And here we may conveniently premise, first, that (besides the provisions hereinafter

(*k*) Statute Law Revision Act, 1875 ; Customs Consolidation Act, 1876, s. 288. See also China Trade Act, 1833 ; East India Company's Act, 1840. And see Merchant Shipping Act, 1894, s. 736 (containing restrictive and regulative provisions regarding the trade with any British possessions on or near the Continent of Europe, or in Africa, or within the Mediterranean Sea ; and regarding the trade with India and China ; and the coasting trade of India).

referred to) the Merchant Shipping Act, 1894, contains divers analogous provisions applicable to the colonies and to other the King's dominions abroad (*l*); and, secondly, that the Act contains also specific provisions relative to *fishing boats*, — for the due registration thereof on the Fishing Boats Register (sects. 373—375), for the maintenance of discipline on board, and otherwise for the due management and regulation, of these boats (sects. 376—398), including *trawlers* (sects. 399—417). But these latter provisions, which are of a very multitudinous character, cannot be dealt with in detail in this chapter (*m*).

II. *The Laws relating to the Ownership, Registration, and Transfer of Merchant Ships.*—The Merchant Shipping Act, 1894, provides, that no ship shall be deemed a British ship unless she belong wholly to owners of some or one of the following descriptions, namely:—natural-born subjects, persons made denizens, or naturalized by Act of Parliament, or by the proper legislative authority of some British possession, or bodies corporate established under the laws of (and having their principal place of business in) the United Kingdom or some British possession (*n*). But as to natural-born subjects, it is provided, that none can be an owner who has taken the oath of allegiance to any foreign sovereign or state, unless he has subsequently resumed his allegiance to the King, and is and continues during the whole of his ownership resident within his Majesty's dominions, or if not so resident, then is a

(*l*) Merchant Shipping Act, 1894, ss. 91, 712, superseding Merchant Shipping Act, 1854, s. 17.

(*m*) The Act of 1894 has been amended by the following statutes, viz.: The Merchant Shipping Act, 1897 (as to under-manning); and Merchant Shipping (Exemption from Pilotage) Act, 1897; Merchant Shipping (Liability of Shipowners) Act, 1898; Merchant Shipping (Mercantile Marine Fund) Act, 1898; and Merchant Shipping (Liability of Shipowners and Others) Act, 1900.

(*n*) Merchant Shipping Act, 1894, s. 1.

partner in a firm actually carrying on business within his Majesty's dominions. And persons made denizens or naturalized, when they too have taken such oath of foreign allegiance, are subject to the like provisions. Moreover, nothing in the Naturalization Act, 1870, is "to qualify an alien to be the owner of a British ship" (*o*). The Merchant Shipping Act, 1894, further provides, that every British ship (with some few exceptions) must be *registered* (*p*); and unless registered, she is not to be recognized as a British ship, or to be entitled to any of the advantages, or to the protection usually enjoyed by such a ship, or to use the national flag or to assume the national character (*q*). And a vessel which is required by the Act to be registered may be detained until the master of the ship, if so required, produces the certificate of the due registration of the vessel. The registration is effected, in the United Kingdom, at any port approved by the proper authority for the registry of ships, and is made with the collector, comptroller, or other principal officer of the customs in such port (*r*); and the port at which any ship is registered is thereafter considered as that to which she belongs, till her registry is transferred to another port (*s*). The registration comprises, *inter alia*, the name of the ship, which must have been previously marked on each of her bows, and (together with her port of registry) on her stern, in a permanent and conspicuous manner to the satisfaction of the Board of Trade (*t*); and also the names and

(*o*) 33 & 34 Vict. c. 14, s. 14.

(*p*) Merchant Shipping Act, 1894, s. 2. The exceptions are—1. Ships not exceeding fifteen tons burthen, employed solely on the rivers or coasts of the United Kingdom, or of some British possession within which the managing owners reside; 2. Ships not exceeding thirty tons burthen, and not having a whole or fixed deck, employed solely coastwise, on the shores of Newfoundland, or parts adjacent, or in the Gulf of St. Lawrence, or on such portion of the coasts of Canada as lie bordering on such gulf.

(*q*) *The Andalusian* (1878), 3 P. D. 182; *The Brunel*, [1900] P. 24.

(*r*) Merchant Shipping Act, 1894, s. 4.

(*s*) Sect. 13.

(*t*) Sect. 7.

descriptions of the owners (*u*). And with regard to the owners who may be registered, the Act provides as follows:—(1) The property in every ship is always to be divided for this purpose into sixty-four shares (*x*); (2) No person is to be registered as owner of any fractional part of a share (*y*); (3) The individuals registered as owners of the sixty-four shares are not to exceed sixty-four in number, except that any number of persons, not exceeding five, may be registered as the joint owners of any particular share (*z*); (4) The property in the ship or its shares, so far as regards the power of making title to a purchaser or mortgagee, is vested exclusively in the registered owners (*a*), but any number of other persons may be *beneficially or equitably* interested therein, and may enforce their rights as such in the High Court (*b*); (5) A registered ship, or any share therein, when disposed of to a person qualified to be the owner of a British ship (*c*), is *transferred* by a bill of sale, or deed in the prescribed form, the name of the transferee being entered on the register (*d*), no other registration thereof being required; and (6) A registered ship or any share therein may be *mortgaged* by instrument in the prescribed form (*e*), the mortgage being entered on the register (*f*). Where there are several mortgagees, their respective priorities are in all cases determined according to the times of their respective registrations, and not the times of their respective executions (*g*); and when a mortgage is discharged, the

(*u*) Act of 1894, s. 11.
(*x*) Sect. 5.
(*y*) *Ibid.*
(*z*) *Ibid.*
(*a*) Sects. 5, 24, 56.
(*b*) Sects. 5, 57; *Liverpool Marine Credit Co.* v. *Wilson* (1872), L. R. 7 Ch. App. 507; *Rusden* v. *Pope* (1868), *ib.* 3 Exch. 269.
(*c*) Sect. 24.
(*d*) Sects. 24—26.
(*e*) Sect. 31; *Ward* v. *Beck* (1863), 13 C. B. (N.S.) 668; *The Innisfallen* (1866), L. R. 1 Adm. & Ecc. 72.
(*f*) Sect. 31.
(*g*) Sect. 33.

entry thereof on the register is to be vacated (*h*). The Act contains also minute provisions, relative to the preliminaries to registration and the mode of compliance therewith, and to the transmission of the title to the ship, otherwise than by transfer, as, *e.g.*, on death, marriage, and the like ; and it provides also (among other things) for the granting of *certificates of mortgage and sale* to the registered owners of the ship, enabling them to mortgage the ship or their share therein, or to sell the whole ship, abroad, out of the country of its registry.

III. *The Laws relating to Merchant Seamen.*—These laws have chiefly in view the great national object of promoting the increase of our mercantile marine, of securing their health efficiency and discipline, and of affording them all due encouragement and protection. In furtherance of these objects, the Act of 1894, continuing in these respects the like provisions contained in the earlier Merchant Shipping Acts, provides, that local marine boards shall be established at certain of the sea ports of the United Kingdom, for carrying into effect the particular provisions of the Act, under the general superintendence of the Board of Trade (*i*). And in every such seaport, its local marine board is required to establish a mercantile marine office or offices, under the management of *Superintendents* (*k*) ; whose business it is, to afford facilities for engaging seamen by means of registries of their names and characters, to superintend and facilitate their engagement and discharge, to provide means for securing the presence on board, at the proper times, of men so engaged, to encourage the making of apprenticeships to the sea service, and generally, to perform such other duties relating to merchant seamen and merchant ships, as

(*h*) Sect. 32.
(*i*) Sect. 244.
(*k*) Sects. 246, 247.

may be committed to them by the Board of Trade (*l*). Examinations also are instituted for persons intending to become masters or mates of foreign-going ships, or of home-trade passenger ships, before examiners appointed by the local marine board (*m*); and no person is to be employed in a foreign-going ship as master, or as first or second or only mate—or in a home-trade passenger ship, as master or first or only mate—unless he possesses a "certificate of competency" to be obtained after such examination (*n*), or (in the case of a person who has attained a certain rank in the service of his Majesty) a "certificate of service" (*o*), either of which certificates is to be granted by the Board of Trade, to such persons as it finds to be entitled to them. And the Act provides also for certificates of competency as engineers being granted, to persons desirous of obtaining the same (*p*).

In addition to these provisions, there are a variety of others, intended for the protection of seamen, and for promoting their health and comfort, among which we may note the following, that the master of every ship—except those of less than eighty tons registered tonnage exclusively employed in the coasting trade of the United Kingdom—must, in the case of every seaman whom he carries to sea from any part of the United Kingdom, enter into an agreement with him (*q*), in a form sanctioned by the Board of Trade, and signed by both master and seaman (the master to sign before the seaman signs), setting forth the nature and duration of the voyage, or else the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which it is not to extend, the number and description of the crew, the time at which such seaman is to be on board or to begin work, the

(*l*) Act of 1894, s. 247.
(*m*) Sect. 94
(*n*) Sect. 92.
(*o*) Sect. 99.
(*p*) Sect. 96.
(*q*) Sect. 113.

capacity in which he is to serve, the amount of his wages, a scale of provisions, together with the approved and agreed regulations as to conduct and as to fines or other punishments for misconduct (*r*). The Act also provides, that no right to wages shall be dependent on the earning of freight (*s*), an innovation upon the common law, which regarded freight as the mother of wages ; and that every stipulation on the part of the seaman, for abandoning his right to wages, in the event of the loss of the ship, or any right which he may have or obtain in the nature of salvage, shall be wholly inoperative (*t*). The Act also provides, that seamen and apprentices in any ship shall have such space allotted to them as in the Act is specified (*u*), which space is to be kept free from stores or goods of any kind (not being the personal property of the crew in use during the voyage), and is to be properly constructed and ventilated (*x*) ; also that every ship, navigating between the United Kingdom and any place out of the same, shall (besides having a due supply of wholesome provisions and water) (*y*) be properly supplied with medicines, to be examined by medical inspectors appointed for that purpose (*z*), who may also inspect the state of health of the seamen (*a*). The Act also provides, that "official log-books" shall be kept in every ship (except those employed exclusively in the coasting trade of the United Kingdom), in such form as is prescribed by the Board of Trade, either in connection with or distinct from the ordinary log-books ; and that, in all cases, entry shall be made in the official log-books (as soon as possible

(*r*) Sect. 114.

(*s*) Sect. 157, re-enacting ss. 183 and 184 of Merchant Shipping Act, 1854.

(*t*) Sect. 156 ; *The Rosario* (1876), 2 P. D. 41 ; Merchant Shipping Act Amendment Act, 1862, s. 18.

(*u*) Act of 1894, s. 210.

(*x*) *Ibid.*

(*y*) Sects. 198, 199.

(*z*) Sects. 200—209.

(*a*) Merchant Shipping Act, 1894, s. 203.

after the occurrence), of every offence committed and punishment inflicted, and of every case of illness, injury, or death (*b*).

Careful provisions have also been made to protect seamen as well as others from the dangers which arise from ships being sent to sea in an unseaworthy and unsafe condition. Thus, in the first place, it is enacted by section 463 of the Act of 1894, continuing the like provision contained in the Merchant Shipping Act, 1871, s. 7, that when any seaman or apprentice is being proceeded against for deserting his ship, or for neglecting or refusing to join, or for being absent or quitting her without leave, and it shall be alleged by a certain proportion of the seamen belonging to such ship, that (by reason of unseaworthiness, overloading, improper loading, defective equipment, or for any other reason) she is not in a fit condition to proceed to sea, or that the accommodation therein is insufficient, the court having cognizance of the case may inquire into such allegations, and in case of doubt may order a survey of the vessel: and the costs of such survey are directed to follow the event thereof. In the second place, by sections 459, 460 of the Act of 1894, continuing (in effect) the like provisions contained in the Merchant Shipping Act, 1876, s. 6, as amended by the Shipping Casualties Investigation Act, 1879, the Merchant Shipping (Fishing Boats) Act, 1887, and the Merchant Shipping Acts, 1890 and 1892, it is provided, (in effect) that whenever the Board of Trade has reason to believe, on complaint or otherwise, that any British ship is, by reason of the defective condition of her hull, equipments, or machinery, or of her overloading or improper loading,—or, now, by reason of undermanning (*c*),—unfit to proceed to sea without serious danger to human life, having regard to the service for which she is intended, the Board may

(*b*) Act of 1894, ss. 239–243.

(*c*) Merchant Shipping Act, 1897.

direct that the ship shall be provisionally detained, as an unsafe ship, for the purpose or being surveyed by some competent person ; and on his report, the Board may make such further order as it shall think requisite, either as to the detention of the ship or as to her release, and either absolutely or upon such conditions as the Board may impose (*d*). If, upon such survey, it is reported by the "Court of Survey" having cognizance of the case, that there was not reasonable and proper cause for the provisional detention of the ship, the Board of Trade is made liable to pay the owner his costs, and also compensation for any loss or damage sustained in consequence of the detention ; but if the report be to the effect that the ship was unsafe, then the Board of Trade is to have its costs from the owner, which costs are made recoverable as salvage is recoverable (*e*). And it is further enacted, by section 457 of the Act of 1894, continuing the like provisions contained in the Merchant Shipping Act, 1876, s. 4, that a master who shall knowingly take, and an owner who shall send or attempt to send, a ship to sea, in such an unseaworthy state as is likely to endanger the life of any seaman or other person, shall be guilty of an indictable *misdemeanor;* unless he proves, either that he used all reasonable means to ensure her being sent to sea seaworthy, or that her going to sea in an unseaworthy state was, under the circumstances, reasonable and justifiable.

The Act of 1894, in continuance of the like provisions contained in the earlier Merchant Shipping Acts, has further provided, that there shall be, in the port of London, a General Register and Record Office for Seamen (*f*) ; and that, as regards every foreign-going ship, the master thereof shall, within forty-eight hours after

(*d*) *Lewis* v. *Gray* (1876), 1 C. P. D. 452.

(*e*) Merchant Shipping Act, 1894, s. 460.

(*f*) Sect. 251.

her arrival at her final port of destination in the United Kingdom, or upon discharge of the crew, (whichever first happens,) deliver, to the Superintendent of the Mercantile Marine Office before whom the crew is discharged, a list containing, *inter alia*, the number and date of the ship's register and her registered tonnage, the length and general nature of her voyage or employment, the names, ages, and places of birth of the master, the crew, and the apprentices, their ratings on board their last ships or other employment, and the dates and places of their joining the ship. And further, that, as regards every home-trade ship, the master or owner thereof shall, every half-year, that is to say, on or within twenty-one days after the 30th June and 31st December in each year, transmit or deliver to some Mercantile Marine Superintendent in the United Kingdom, a similar list for the preceding half-year: and that all such lists, together with other documents in the Acts particularized, shall be transmitted, by the Superintendents by whom they have been received, to the Registrar-General of Shipping and Seamen, to be by him recorded and preserved, and produced to any person desirous of inspecting the same (*g*). In addition to all these provisions, it is further directed, that there shall be transmitted, by the proper authorities, every half-year, that is to say, on or before the 1st day of February and 1st day of August in every year, to such Registrar-General a list of all ships which shall be registered in any port in the United Kingdom, and also of all ships whose registers have been transferred or cancelled in such port since the last preceding return; and the registrars of shipping make monthly, and may be required to make even shorter, returns of the like particulars of transfer (*h*).

(*g*) Act of 1894, ss. 253, 256. (*h*) Sect. 63.

IV. *The laws relating to Pilotage.*—These laws apply to the United Kingdom only (*i*), being municipal laws; and as regards such laws, the Merchant Shipping Act, 1894 (*k*), recognizes and confirms the powers and jurisdictions theretofore lawfully exercised by various bodies of persons in different parts of the kingdom, with regard to the appointment and regulation of pilots for the districts for which they respectively act. These bodies have been commonly called "Pilotage Authorities"; and the most important of them is the Trinity House of Deptford Strond, which is a company of masters of ships, incorporated in the reign of Henry the Eighth, and charged under many successive charters and Acts of Parliament with numerous duties relating to the marine. Where there is no such authority already existing, for any place or district in the United Kingdom, the Board of Trade creates the pilotage authority, and fixes its district (in which new district, however, there is no *compulsory* pilotage (*l*)).

The pilotage authorities (*m*) are severally enabled, by by-laws to be made with the consent of his Majesty in council, to determine the qualifications to be required from persons applying to them to be licensed as pilots, whether in respect of their age, skill, time of service, character, or otherwise, and to issue licences, accordingly, to such persons as are qualified, and to make regulations, for the government of the pilots they so license (*n*), including the withdrawal or suspension of any licence, and the terms upon which any special licence may be granted. And they are required to deliver periodically to the Board

(*i*) Sect. 572.

(*k*) Sects. 573, 574.

(*l*) Sect. 575. Where pilotage is compulsory, the owner of the ship is not liable for the negligence of the pilot (*ibid.* s. 633).

(*m*) Sect. 581.

(*n*) Sect. 582; *Henry* v. *Newcastle Trinity House Board* (1858), 8 El. & Bl. 723.

of Trade returns, comprising (among other particulars) the names and ages of all pilots or apprentices acting under their authority, and the nature of the service for which each is licensed (*o*); which returns are laid by the Board of Trade, without delay, before both houses of parliament (*p*). Every pilotage authority may, by by-law made with the consent of his Majesty in council, exempt (within the limits of its own district) the masters of any ships, or of any classes of ships, from being compelled to employ qualified pilots (*q*); and the Board of Trade also may, by provisional order confirmed by parliament, exempt masters from being obliged to employ pilots in any, or in any part of any, pilotage district (*r*). Also, the master or mate of any ship may apply to any pilotage authority, to be examined as to his capacity to pilot the ship to which he belongs, or any one or more ships belonging to the same owner, within any part of the district of such pilotage authority; and if he is found competent, a pilotage certificate is granted, to enable him to pilot such ships himself within the limits therein described, without incurring a penalty for failing to employ a qualified pilot (*s*). But every master of a ship not so exempted navigating within any district, who, after a qualified pilot has offered to take charge of her or has made a signal for that purpose, either himself pilots the ship without possessing a pilotage certificate enabling him to do so, or employs or continues to employ an unqualified person to pilot her, incurs for every such offence a penalty of double the amount of pilotage demandable for the conduct of such ship (*t*); and the like penalty is incurred

(*o*) Act of 1894, s. 585.

(*p*) Sect. 585.

(*q*) Sect. 581. See *The Bristol City*, [1902] P. 10.

(*r*) Sect. 578.

(*s*) Sect. 599.

(*t*) Sect. 603; *R.* v. *Stanton* (1857), 8 El. & Bl. 445; *Tyne Improvement Commissioners* v. *General Steam Navigation Company* (1866), L. R. 2 Q. B. 65.

by the master of an exempted ship, who, under the like circumstances, employs or continues to employ an unqualified person to pilot her.

Certain exemptions from the obligation to employ a pilot have been created by the Pilotage Act, 1825, as amended by Order in Council of the 18th February, 1854, and the Merchant Shipping Act, 1894; and they apply to all the waters round the British Isles. They are:—(1) vessels passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district, provided the ship does not load or discharge at any place within the district or at any place situate above the district on the same river or its tributaries (*u*); (2) vessels whose master or mate hold certificates authorizing them to pilot their ship (*x*): (3) British ships, except when carrying passengers between places in the British Isles, whilst within the limits of the port to which they belong, and for which no particular provision has heretofore been made by Act of Parliament or charter for the appointment of pilots, provided the master pilots the ship without the assistance of any unlicensed pilot (*y*): (4) vessels changing moorings or going in or out of dock (*z*); (5) vessels employed in the regular coasting trade of the kingdom when not carrying passengers (*a*); (6) vessels laden with stone from the Channel Islands and Isle of Man when not carrying passengers (*a*); (7) British and certain foreign

(*u*) Merchant Shipping Act, 1894, s. 605.

(*x*) Sect. 604; *The Warsaw* (1898), 8 Asp. M. C. 399.

(*y*) Pilotage Act, 1825, s. 59; Merchant Shipping Act, 1894, ss. 603 and 625; *The Hankow* (1879), 4 P. D. 197; *The Killarney* (1862), Lush. 427; *The Hanna* (1866), L. R. 1 Ad. & Ecc. 283.

(*z*) Pilotage Act, 1825, s. 63. Cf. *The Clan Grant* (1887), 6 Asp. M. C. 144; *M'Intosh* v. *Slade* (1827), 6 B. & C. 657; *Lucey* v. *Ingram* (1840), 6 M. & W. 302; *The Guy Mannering* (1882), 7 P. D. 132.

(*a*) Pilotage Act, 1825, ss. 59, 89.

ships, not exceeding sixty tons register, under certain circumstances (*b*).

With regard to the Trinity House in particular, that pilotage authority is allowed to appoint and license pilots for the limits following, that is to say,—(1.) "The London District," comprising the waters of the Thames and Medway, as high as London Bridge and Rochester Bridge respectively, and the seas and channels leading thereto or therefrom, as far as Orfordness to the north and Dungeness to the south, but so nevertheless that no pilot shall be licensed to conduct ships both above and below Gravesend; (2.) "The English Channel District," comprising the seas between Dungeness and the Isle of Wight; and (3.) "The Trinity House Outport Districts," comprising any pilotage district, for the appointment of pilots within which no particular provision is made by Act of Parliament or charter (*c*). As a general rule, the employment of pilots in the first and third of these districts is compulsory (*d*), subject to a penalty (*e*), except that certain classes of ships, besides those mentioned above, *when not carrying passengers* (*f*), are exempted from compulsory pilotage in the London District and the Trinity House Outport Districts, that is to say:—(1) ships trading from any port in Great Britain within the London District or any of the Trinity House Outport Districts to the port of Brest in France, or to any port in Europe north and east of Brest (*g*), or to the Channel Islands or Isle of Man; (2) ships trading from the port of Brest or any port in Europe north or east of Brest, or from the Channel Islands or Isle of Man, to any port in Great Britain within the London District or the Trinity House Outport

(*b*) Pilotage Act, 1825, s. 59. See Abbott, *Shipping* (14th ed.), p. 314.

(*c*) Act of 1894, s. 618.

(*d*) Sect. 622; *The Hanna* (1866), L. R. 1 Ad. & Ecc. 283.

(*e*) Sect. 622.

(*f*) *The Lion* (1868), L. R. 2 Ad. & Ecc. 102.

(*g*) Save between Sweden (or Norway) and London (Merchant Shipping (Exemption from Pilotage) Act, 1897).

Districts ; (3) British vessels trading, which includes carrying of passengers (*i*), to the Cattegat or Baltic, or round the North Cape or into the White Sea, or to ports between Boulogne inclusive and the Baltic, on their inward or outward voyages to and from the Thames ; provided the master pilots the vessel without the assistance of any unlicensed person and the vessel does not carry passengers between any port in Sweden and Norway and the port of London (*k*) ; (4) the master or mate of any ship being owner or part owner thereof and residing at Dover, Deal, or the Isle of Thanet, may pilot such ship from any of the places aforesaid up or down the rivers Thames, or Medway, or into or out of any port within the jurisdiction of the Cinque Ports (*l*) ; (5) ships navigating in ballast from one port to another in the United Kingdom (*m*). The Merchant Shipping Act contains also a general provision, to the effect that no owner or master of any ship shall be answerable to any person whatever, for any loss or damage exclusively occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law (*n*).

V. *The Laws relating to Lighthouses, Beacons, and Seamarks.*—By our law, the power of erecting, placing, and maintaining lighthouses, beacons, and seamarks is, as we

(*i*) *The Temora* (1860), Lush. 17 ; *R.* v. *Stanton* (1857), 8 E. & B. 445 ; *The Earl of Auckland* (1861), Lush. 164, 387.

(*k*) Pilotage Act, 1825, s. 59, as amended by Order in Council, February 18th, 1854 ; and Merchant Shipping (Exemption from Pilotage) Act, 1897, s. 1.

(*l*) Pilotage Act, 1825, s. 62. For limits of Cinque Ports, see Cinque Ports Act, 1821, s. 18.

(*m*) Order in Council, July 25th, 1861.

(*n*) Sect. 633 ; *Tyne Improvement Commissioners* v. *General Steam Navigation Company* (1866), L. R. 2 Q. B. 65 ; *Moss* v. *The African Steamship Company* (1868), *ib.* 2 P. C. 238 ; *The Lion* (1869), *ib.* 525 ; *Clyde Navigation Company* v. *Barclay* (1876), L. R. 1 App. Ca. 790 ; *The Princeton* (1878), 3 P. D. 90 ; *The Mary* (1879), 5 P. D. 14.

have said (*o*), incident to the royal prerogative; but by the 8 Eliz. (1566), c. 13, it was specially committed to the Trinity House, and the authority of this corporation was subsequently confirmed and also regulated by successive statutes, and principally by the earlier Merchant Shipping Acts. And now, by the Merchant Shipping Act, 1894, it is provided, that, subject to the particular provisions of the Act and subject to any powers or rights theretofore lawfully exercised by any person or body of persons having authority over *local* lighthouses, buoys, or beacons (by the Act styled "Local Lighthouse Authorities"), the superintendence and management of all lighthouses, buoys, and beacons shall be vested (for England, Wales, Jersey, Guernsey, Sark, and Alderney, and the adjacent seas and islands, and for Gibraltar,) in the *Trinity House*, and (for Scotland and the adjacent seas and islands, and the Isle of Man) in the *Commissioners of Northern Lighthouses*, and (for Ireland and the adjacent seas and islands) in the *Commissioners of Irish Lights;* which three bodies are distinguished from the "Local Lighthouse Authorities" by the name of the "General Lighthouse Authorities" (*p*). Every General Lighthouse Authority regulates, within its own jurisdiction, and with the sanction of the Board of Trade, the proceedings of the local lighthouse authority or authorities (*q*), but is itself subject to the regulations of the Board of Trade. The Act gives power to each General Lighthouse Authority, within its own jurisdiction, to erect or make new lighthouses, buoys, or beacons, and to alter or remove existing ones, and to vary the character of any lighthouse, or the mode of exhibiting lights therein (*r*). But these powers

(*o*) *Vide sup.* vol. II. p. 502.

(*p*) Merchant Shipping Act, 1894, s. 634.

(*q*) Sect. 652.

(*r*) Sect. 638. And see the Merchant Shipping (Mercantile Marine Fund) Act, 1898, whereby certain of the expenses relating to lighthouses, buoys, and beacons have been transferred from the *Mercantile Marine Fund* to the *General Lighthouse Fund.*

are not to be exercised, in the case of the General Lighthouse Authorities for Scotland or Ireland, without the sanction of the Trinity House, and the approval of the Board of Trade (*s*); and the Trinity House may, with the previous sanction of the Board of Trade, direct these two last-mentioned General Lighthouse Authorities, within their respective jurisdictions, to continue any existing lighthouses, buoys, or beacons, and to erect or place, alter or remove, any new ones, and to vary the character of any lighthouse, or the mode of exhibiting lights therein (*t*).

The amount of dues to be levied on ships for the upkeep of lights and beacons belonging to the General Lighthouse Authorities is fixed now by the Merchant Shipping (Mercantile Marine Fund) Act, 1898, and is based on the tonnage of the ship, and the number of voyages she performs each year. Before this Act the dues were levied for each light passed on the voyage.

The Merchant Shipping Act, 1894, contains also provisions for the punishment of all persons wilfully or negligently injuring any lighthouse, buoy, or beacon, or removing, altering, or destroying any light-ship, buoy, or beacon, or riding by, making fast to, or running foul of, any light-ship or buoy, or burning or exhibiting (after being duly warned to the contrary by notice from the proper General Lighthouse Authority) any fire or light so placed as to be liable to be mistaken for a light proceeding from a lighthouse (*u*). And by sections 530 and 531, in continuance of the like provisions contained in section 5 of the Removal of Wrecks Act, 1877, as amended by the Removal of Wrecks Act, 1877, Amendment Act, 1889, the proper general Lighthouse Authority is to remove any wreck which is or is likely to become an obstruction or danger to navigation,—this duty being, however, (in the case of wreck in any harbour,) placed on the harbour

(*s*) Sect. 638.
(*t*) Sect. 641.
(*u*) Sects. 666, 667.

commissioners, and (in the case of wreck in any tidal river) on the river conservancy board (*x*).

VI. *The Laws relating to the Liability of Shipowners.*—Formerly, while discussing the law of carriers, we had occasion incidentally to state the nature and extent of a shipowner's responsibility for loss or damage to *goods* on board his ship for carriage (*y*) : and we have to add, that, a shipowner as a general rule is liable also for any injury to the passengers in his ship, being responsible generally for the way in which his ship is managed by those whom he employs, in the same way that an ordinary master is liable for the conduct of his servants (*z*). But a limit is placed by statute to the amount of damages recoverable from a shipowner who is *personally* blameless ; it being provided by section 503 of the Merchant Shipping Act, 1894, in continuance of the like provision contained in the Merchant Shipping Act Amendment Act, 1862, s. 54 (*a*), that, in case loss arises without his actual fault or privity, the owner of any ship (whether British or foreign) shall not be answerable in damages, in respect of loss of life or personal injury (either alone or together with loss or damage to property), to an aggregate amount exceeding *fifteen* pounds for each ton of the ship's tonnage ; nor, in respect of injury to property (whether there be in addition loss of life or personal injury or not), to an aggregate amount exceeding *eight* pounds for each ton of such

(*x*) The marine insurance society called "Lloyds," is, by Lloyds Signal Stations Act, 1888, authorized to erect signal stations and signal houses, and to establish telegraphic communication therewith, subject to the approval of the Board of Trade, and to acquire lands for the purpose ; but (by sect. 10) no such erection is to be made which, in the opinion of the general lighthouse authority of the place, would interfere with any lighthouse, beacon, or seamark.

(*y*) *Vide sup.* vol. II. p. 127.

(*z*) *Steel* v. *Lester* (1877), 3 C. P. D. 121.

(*a*) *The Obey* (1866), L. R. 1 Adm. & Ecc. 102 ; *The Northumbria* (1869), 3 Adm. & Ecc. 6, 24 ; *Smith* v. *Kirby* (1875), 1 Q. B. D. 131.

tonnage (*b*). By section 502 of the Act of 1894, the owner of a British sea-going ship, who is personally blameless, is not liable for damage by fire to *any* goods, or for theft of valuables, the nature and value of which have not been communicated to him at the time of shipment. And by way of making further provision for the protection of shipowners, it has been enacted (*c*), that in all cases where several claims are made or apprehended against any owner for compensation,—whether for loss of life or personal injury, or for the loss or damage of ships, boats, or goods,—proceedings may be instituted at the suit of the owner for the purpose of determining his aggregate liability ; and the court may distribute the total amount rateably among the several claimants, and may stay all other proceedings in relation to the same subject-matter (*d*). With regard, however, to all these provisions of the Merchant Shipping Act, it is material to observe, that none of them is to lessen or take away any liability to which any *master* or *seaman*, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman (*e*).

VII. *The Laws relating to Fishing Boats and Fisheries.*—The law relating to fishing boats is contained in the fourth part of the Merchant Shipping Act, 1894. By the provisions of that Act, every fishing boat used in sea fishing, whether for profit or not, must be registered on the Fishing Boat Register, and must be lettered and numbered (*f*). Decked fishing boats, before proceeding to sea, must be provided with such appliances for the

(*b*) *Glaholm* v. *Barker* (1866), L. R. 1 Ch. App. 223 ; *The Bernina* (1888), 13 App. Ca. 1.

(*c*) Merchant Shipping Act, 1894, s. 504 ; amended by the Merchant Shipping (Liability of Shipowners) Act, 1898.

(*d*) *The Franconia* (1878), 3 P. D. 164.

(*e*) Merchant Shipping Act, 1894, s. 508, amended by the Merchant Shipping (Liability of Shipowners) Act, 1898.

(*f*) Merchant Shipping Act, 1894, s. 373.

safety of her crew as the Act prescribes (*g*). Trawlers of twenty-five tons or upwards must carry a certificated master and second hand, and a formal agreement with her crew must be entered into before she proceeds on a fishing voyage (*h*). The maintenance of discipline on board can be enforced by fine and imprisonment (*i*). The time and mode of sea fishing are regulated by some of the fishery Acts mentioned hereafter, or by by-laws made thereunder with the sanction of the Board of Trade. There are a great many statutes relating to fisheries, providing for their maintenance and development (*k*); and in particular for the protection of the breed of fish, and for the prevention of practices tending to destroy the spawn or fry, and for the protection and safety of the persons engaged in this peculiarly hazardous occupation, and for their moral and spiritual welfare (*l*). The principal of these statutes are the Sea Fisheries Acts, 1843 to 1893; the Salmon and Freshwater Fisheries Acts, 1861 to 1892; the Sea Fisheries Regulation Acts, 1888 to 1894; and the Freshwater Fisheries Acts, 1878 to 1886. Within the territorial limits, the regulation of sea fisheries on the coast is carried out by the local fisheries committees which have been formed under the provisions of the Sea Fisheries Regulation Act, 1888. These committees have power, with the approval of the Board of Trade, to make

(*g*) Act of 1894, s. 375.

(*h*) *Ibid.* ss. 399, 401. The Board of Trade have exempted sailing trawlers under 50 tons and paddle steamers engaged as trawlers from these provisions (Order of Board of Trade, Nov. 2nd, 1899.)

(*i*) *Ibid.* s. 376.

(*k*) *Bounties* were formerly payable upon the taking and curing of certain kinds of fish, and upon the vessels employed in these industries; but all such bounties have long been repealed.

(*l*) See North Sea Fisheries Act, 1893, being an Act for the regulation of the liquor traffic among fishing boats and fishermen engaged in the North Sea, and enforcing certain conventions in that behalf entered into by this country with Belgium, Holland, Denmark, and Germany, in 1887; and see also the general provisions contained in the Merchant Shipping Act, 1894, ss. 369—417.

by-laws for the regulation and improvement of the fisheries within their districts. The supervision of the salmon and freshwater fisheries has been placed in the hands of the boards of conservators appointed under the Salmon and Freshwater Fisheries Acts, 1861 to 1892. In addition to these Acts (which are more or less general), there are also numerous Acts of a special and local character, regulating particular local fisheries, or regulating specific fishing industries, or the trade in specific fish, or the trade in fish of particular towns and places. Thus, the trade in fish, as regards the cities of London and Westminster, is governed by the Fish Carriage Act, 1762 ; the 9 & 10 Vict. (1846), c. cccxlvi. ; and the Nore Tolls Act, 1859,—the general object of which is to secure a supply of fresh fish to those cities, and to prevent the same being forestalled.

CHAPTER XII.

OF THE LAWS RELATING TO BANKS, AND ESPECIALLY OF THE BANK OF ENGLAND.

BANKING is supposed to have been originally invented in the Republic of Venice: where, so early as the year 1171, Jews were accustomed to keep benches in the market-place for the exchange of money and bills. *Banco* being the Italian for *bench*, banks may have taken their name from this circumstance. In our own country, the business of banking appears to have been originally carried on chiefly by the goldsmiths: for we find it recited in an Act of the year 1670 (22 & 23 Car. II. c. 3) "that several persons, being *goldsmiths*, and others, by "taking up or borrowing great sums of money, and "lending out the same for extraordinary hire or profit, "have gained and acquired to themselves the reputation "and name of *bankers*." At a later date, in the reign of William and Mary, the project was conceived of establishing in England a national institution of the same description with the banks then already established at Genoa and Amsterdam (*a*); and in 1694, an Act was passed sanctioning the creation of that great corporate body, which has become so celebrated, under the designation of "The Governor and Company of the Bank of England," or, in popular language, "The Bank of England." Many other banks, including private banks and joint-stock banks, have since been established, not to

(*a*) Its principal projector was Mr William Paterson, a Scotch gentleman. For the early history of the bank, see *Bank of England* v. *Anderson* (1837), 3 Bing. N. C. 589.

mention the savings banks, of which we shall also treat in this chapter.

The Act by which the Bank of England was established is the Bank of England Act, 1694 (5 & 6 W. & M. c. 20) ; by which Act, after empowering their Majesties to incorporate, by letters patent, "The Governor and Company of the Bank of England," and after prohibiting the corporation from buying and selling goods, lest the lieges should be oppressed by their monopolizing or "engrossing any sort of goods, wares, or merchandize" (*b*), it was provided and declared, that the Bank might deal in bills of exchange, or in buying and selling bullion, gold, or silver, and might sell any goods whatsoever left with it in pledge, and not redeemed at the time agreed upon, or within three months after, and might also sell goods, the produce of lands which it had purchased (*c*). And we find that as a fact, from the time of the passing of the Act or soon afterwards, the Bank began the practice, which it has ever since continued, of issuing its own notes (*d*). And by subsequent Acts, it was provided, that no other bank, or company in the nature of a bank, should be established by Act of Parliament in this kingdom (*e*) ; and various exclusive privileges were conferred on the Bank of England.

Subject, however, to these exclusive privileges, as the same were afterwards from time to time modified, the trade of banking has, from its first introduction, been always free, both in London and in the country. Some of the country banks have carried on business, like the Bank of England, as *banks of issue*, that is, have made payments by their own notes ; while the other country banks, and all the London banks, have made payments in cash and

(*b*) Sect. 27.

(*c*) Sect. 28.

(*d*) *Bank of England* v. *Anderson* (1837), 3 Bing. N. C. 653, 654.

(*e*) Bank of England Acts, 1696, 1741, 1872 ; but see Bank Act, 1892, s. 7.

Bank of England notes only, and not in notes of their own.

The character of the Bank of England and of its transactions has always maintained an importance far greater than that of any other bank: for, while it has carried on the business ordinarily incident to banking, such as taking deposits of money, issuing its own paper, and discounting mercantile bills, it has also been employed as a great engine of state, in circulating exchequer bills (*f*), in accommodating the government with immediate advances on the credit of deferred funds, in paying the interest due to the holders of the public debt, and in assisting the government generally, in all the great operations of finance. The Bank's advances to the government are, however, subject to the restrictions imposed by the Bank of England Act, 1819, which enacts, in conformity with an earlier regulation in that behalf (*g*), that it shall not be lawful for the Bank to make advances of money to the Crown in any manner whatever, without the express and distinct authority of Parliament for that purpose first obtained. This restriction, however, does not prohibit the Bank from *purchasing* exchequer bills or other government securities, or from advancing, upon the credit of exchequer bills or of treasury bills lawfully issued, any money required to make good any quarterly deficiency in the Consolidated Fund (*h*). Deficiency advances are made by the Bank, under special statutes, for the payment of discount. Moreover, it is entitled to certain allowances for managing the public debt.

In the year 1797, owing to a temporary failure in public credit, consequent upon the war and the heavy demands made upon the Bank by the government, there was such a run upon the Bank, that it was deemed necessary to

(*f*) See Exchequer Bills and Bonds Act, 1866, and an enormous number of earlier Acts, generally connected with the charter.

(*g*) Act of 1694, s. 30.

(*h*) Exchequer and Audit Departments Act, 1866, s. 12; Treasury Bills Act, 1877, s. 13.

relieve it for a limited period from the necessity of making payments in cash (see 37 Geo. 3, c. 45, continued, by subsequent Acts, until the 1st of May, 1823).

In the year 1826, the Bank was authorized to extend the circulation of its paper, by establishing banks of its own, which, though not under the immediate management of the Bank directors, should be carried on by the agents of the Bank, at any place or places in England where such a branch should be established (*i*) ; and in the same year, and apparently in consideration of this privilege, the Bank relinquished in part its old exclusive privileges, so as to allow of the establishment of other banking companies, to wit, joint-stock banks, not carrying on business within sixty-five miles from London (*k*). But all Bank of England "notes on demand," issued at any of its branch banks, must be made payable in coin at the place where such notes are issued ; and though the Bank of England is not liable to pay, at any of its branches, notes not made specially payable at such branch, it is, on the other hand, bound to pay *in London* all notes, whether those of the Bank of England itself or of any of its branches (*l*).

The Bank Charter had been originally limited to determine upon twelve months' notice after 1st August, 1705 ; but this period was from time to time extended by successive Acts of Parliament, the charter being at the same time modified in various ways. And in particular, by the Bank of England Act, 1833, it was provided, that after the 1st August, 1834, until the legislature should otherwise direct, tender of a Bank of England note (expressed to be payable to bearer on demand) should be a legal tender to the amount therein expressed for all sums above 5*l*., so long as the Bank continued to pay, on demand, its notes in legal coin ; but, of course, such note would not be a legal tender either by the Bank itself or by any of

(*i*) Country Bankers Act, 1826, s. 15.

(*k*) *Ibid.* ss. 1—4.

(*l*) Bank of England Act, 1833, ss. 4, 6.

its branches (*m*). And ultimately, in the year 1844, by the Bank Charter Act of that year (7 & 8 Vict. c. 32), great and extensive changes in the law were introduced (*n*), the statute affecting not only the Bank of England, but all banks whatsoever, and its main object being to place the general currency of the country upon a sounder footing, by controlling the issue of paper money, and by preventing as much as possible those fluctuations in the currency, to which many of our commercial embarrassments have been ascribed. The provisions of this Act may now be briefly stated.

I. *As to the Bank of England.*—The Bank Charter was again modified and continued: and was made determinable, on twelve months' notice, pursuant to a vote or resolution in that behalf of the House of Commons, at any time after the 1st August, 1855 (*o*), and on repayment by the Government of certain debts particularized in the Act (*p*). The Act further provided, that the issue of Bank of England notes, payable on demand, should thereafter be kept distinct from the general business of the Bank: and that on the 31st August, 1844, the Bank should transfer to its "*issue* department" securities to the value of 14,000,000*l.* (including the debt due to it by the public), and also so much of the gold coin, and gold and silver bullion (*q*), then held by the Bank, as should not be required by its *banking* department. Thereupon, there was to be delivered out of the *issue* department into the *banking* department, such an amount of Bank of England notes as, together with those in circulation, should be equal to the aggregate amount of the securities, coin, and

(*m*) Bank of England Act, 1833, s. 6.

(*n*) See also Stamp Act, 1854, s. 11; and Bankers' Compositions Act, 1856.

(*o*) Sect. 27.

(*p*) The National Debt Act, 1870 (33 & 34 Vict. c. 71), provides that the Bank of England shall continue a corporation for the purposes of that Act until the National Debt is repaid.

(*q*) The silver bullion is not to exceed one-fourth of the gold coin and bullion (sect. 3).

bullion so transferred to the *issue* department; and it was further provided, that the whole amount of the Bank's notes in circulation, (including those delivered to the banking department,) should be deemed to be issued on the credit of such securities, coin, and bullion, and that the amount of such securities was not to be increased, but might be diminished and again increased, so as not to exceed in the whole the sum of 14,000,000*l.* (*r*). And after such transfer as just mentioned to its issue department, it was made unlawful for the Governor and Company to issue Bank of England notes, either into its banking department, or to any person whatever, save in exchange for other Bank of England notes, or gold coin, or gold or silver bullion, or securities acquired in the issue department under the provisions of the Act. The

(*r*) In the year 1857, a great commercial crisis having arisen, the Bank was unable to meet the applications made to it for discounts and advances on approved securities without exceeding the limits of issue prescribed by law. Therefore the governor and company of the Bank were informed by Government, that it was prepared to propose to parliament a bill to indemnify them in respect of such excess; and notes were accordingly issued in exchange for securities beyond the amount limited by law. Parliament afterwards passed an Act (21 & 22 Vict. c. 1) for indemnifying the Bank in that respect, and for a short suspension of so much of the Act of 1844 as limited the amount of such issue against securities. A similar crisis had occurred previously in 1847, and occurred again subsequently in the year 1866, on each of which occasions Government informed the Bank that they were prepared to take the same course; but no actual infringement of the law took place on the two other occasions, as the commercial panic subsided before the Bank had made issues in excess of the legal limits. What happens in a commercial crisis is this: the reserve of cash and notes in the banking department, which is the ultimate reserve of the whole banking community, becomes dangerously low; people begin to be afraid that they may not be able to get the means for carrying on their pursuits, and demand their balances; the government gives the Bank a letter, which generally quells the excitement; but if necessary the banking department, under the authority of the letter, transfers some of the Bank's own securities to the issue department, and receives in exchange notes with which the reserve of the banking department is replenished.

Act further required, that an account of the notes issued by the *issue* department, and of the securities, gold coin, and gold and silver bullion therein, and also of the capital stocks and deposits, money and securities in the *banking* department, should be transmitted weekly to the Board of Inland Revenue in a prescribed form, and be published by it in the London Gazette; and all persons were declared entitled to demand, from the issue department of the Bank of England, notes in exchange for gold bullion, at the rate of 3*l*. 17*s*. 9*d*. per ounce of standard gold (*s*).

Finally, by the Bank Act, 1892 (55 & 56 Vict. c. 48), section 6,—which section is to be construed as one with the Bank Charter Act, 1844,—notes of the Bank of England issued more than forty years ago, and not presented for payment, may be written off as *dead notes*, and treated as if they had never been issued, so that the Bank is thereby enabled to reissue notes to the amount so written off; but the Bank remains liable, on such dead notes, in case they are presented for payment. By the seventh section of the same Act, provision is made for the grant of a supplemental charter to the Bank, regulating its internal affairs.

II. *As to Other Banks.*—The Act of 1844 provided, that in future it should not be lawful for any banker to draw, accept, make, or issue any bill or note, or engagement for the payment of money, payable to bearer on demand, or to borrow, owe, or take up any money, on his bills or notes payable to bearer on demand (*t*); subject, however, to this proviso, that any banker, who, on the 6th May, 1844, was carrying on the business of a banker, and was then already lawfully issuing his own notes, might continue to issue them, though, if he should become bankrupt, or cease to carry on the business, or discontinue the issue of notes, either by agreement with the Bank of

(*s*) Sect. 4.

(*t*) Sect. 11. *Cf. Att.-Gen.* v. *Birkbeck* (1884), 12 Q. B. D. 605.

England, or otherwise, his privilege in this respect was to be at an end, and incapable of revival (*u*). And as regards any banker continuing to issue his own notes by virtue of this proviso, the Act provided, that he should not thereafter have in circulation a greater amount of notes than the average amount which he had circulated before the Act; and further, that if any such banker ceased to issue his own notes, it should be lawful for her Majesty in council to authorize the Bank of England to increase the 14,000,000*l.* of securities in its issue department, in the proportion of two-thirds of the amount so withdrawn from circulation (*x*). The Act of 1844, moreover, provided (*y*), that every banker (except the Bank of England) should on the 1st of January in every year, or within fifteen days after, make a return to the Board of Inland Revenue, of the name, residence, and occupation of every member of the partnership, of the name of the firm, and of the place where the business was carried on; and the Board, on or before the 1st of March in every year, is to publish the return in some newspaper circulating in the town or county wherein such banker carries on his business.

Another Act affecting banks (other than the Bank of England) is the Companies Act, 1862 (25 & 26 Vict. c. 89), which has been amended by subsequent statutes, and particularly by the Companies Act, 1879 (42 & 43 Vict. c. 76). By these Acts it has been specially provided regarding banks: That no company or association consisting of more than ten persons shall carry on the business of banking, unless it is registered (either as "limited" or as "unlimited") under the Companies Acts, or unless it has been formed in pursuance of some other Act, or of letters-patent (*z*); also, that a banking

(*u*) *Prescott Dimsdale & Co.* v. *Bank of England*, [1894] 1 Q. B. 351.

(*x*) Bank Charter Act, 1844, s. 5.

(*y*) Sect. 21.

(*z*) Act of 1862, s. 4.

company registered as "unlimited" may convert itself into a "limited" one, and for that purpose may increase the nominal amount of its capital by increasing the nominal amount of its shares, with a provision that no part of such increased capital shall be capable of being called up, except in the event and for the purposes of the company being wound up (*a*). Also, that a "bank of issue" registered as a limited company shall not be entitled to limited liability in respect *of its notes*, but the members shall as to these continue liable as if it had been registered as unlimited; and, in the event of the bank being wound up, if the general assets are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members of the banking company, after satisfying the note-holders, are to be liable to contribute, towards payment of the debts of the general creditors, a sum equal to the amount received by the note-holders out of the general assets of the company, that is to say, out of the funds available for the general creditors as well as for the note-holders (*b*). The Acts have also provided, that, once at the least in every year, the accounts of every banking company registered after the 15th August, 1879, as a limited company, shall be examined by an auditor or auditors (elected annually by the company, and not being either a director or officer of the bank), by whom a report on the accounts, and on all balance-sheets laid before the company in any general meeting, shall be made to the members (*c*).

III. *As to Savings Banks.*—These are institutions devised for the safe custody and increase of small savings (*d*). So far as they are regulated by special Acts of Parliament they fall into two classes, viz.: (a) Trustee savings

(*a*) Act of 1879, s. 5.
(*b*) *Ibid.* s. 6.
(*c*) Sect. 7.
(*d*) 57 Geo. 3 (1817), cc. 105, 130, are the earliest Acts referring to small savings.

banks (*e*); (b) Post office savings banks. Both classes enjoy in common certain statutory benefits and immunities, and, subject to certain differences which naturally exist in their constitution and management, come substantially under the same law as regards investment of funds and general conduct of business. The earlier statutes which regulated the constitution and defined the powers and privileges of these banks, were repealed, so far as regards Trustee Savings Banks, and their provisions with amendments consolidated and re-enacted, by the Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87); and the law on this subject is now contained in the last mentioned Act and in the subsequent Acts (some of which were amending Acts) known collectively as the Trustee Savings Banks Acts, 1863 to 1893.

These banks receive deposits of money as low as one shilling, the produce of which is to accumulate at compound interest, and the principal and interest are to be paid out to the depositors, as required, deducting from such produce only the necessary expenses of management. The deposits from a single depositor are not to exceed 50*l.* in all in any one savings bank year (*f*); and no fresh deposit is to be received from him, when the total amount standing to his credit reaches 200*l.* exclusive of interest (*g*). Where the sum standing in the name of any depositor exceeds 200*l.* (principal and interest included), interest is to be for the future allowed on 200*l.* only and not on any excess (*h*). Moreover, all sums in excess of 200*l.* are to be invested (unless the depositor otherwise directs) in government stock (*i*); and such stock may also be purchased by and be credited to the account of the depositor, provided that his total holding of stock is never

(*e*) Frequently called in Scotland prior to the year 1891, "National Security Savings Banks."

(*f*) Act of 1863, s. 39; Act of 1893, s. 1.

(*g*) Act of 1891, s. 11.

(*h*) *Ibid.*

(*i*) Act of 1893, s. 3.

at any one time to exceed 500*l.* stock (*k*) : and that not more than 200*l.* stock is to be credited to his account in any one savings bank year (*l*). Government life annuities up to 100*l.* a year may also be purchased by depositors, and at certain banks (fourteen in all at present) moneys are accepted on a separate account for investment otherwise than with the National Debt Commissioners. This class of business is known as "Special Investment," and since 1891 no more than 500*l.* in all may be accepted from any one special investor.

The management of Trustee Savings Banks is vested in a local board of management composed of trustees only, or of trustees and managers, who are invariably prohibited by the rules of the bank from receiving directly or indirectly any benefit from its funds ; and, subject to a proviso as to special investments, they are required to remit the money deposited, with the exception of what is retained locally to meet current requirements, to the Bank of England (*m*), to an account kept in the names of the National Debt Commissioners, and denominated The Fund for the Banks for Savings. Interest at the rate of 2*l.* 15*s.* per cent. per annum is payable half-yearly on this account to the trustees (*n*), the interest payable to depositors themselves being limited to 2*l.* 10*s.* per cent. per annum (*o*). Various provisions have also been made, to secure the proper management of savings banks, an inspection committee having been appointed, to exercise certain limited powers of supervision and control, by the Act of 1891. Other provisions have been made from time to time, to save expense to depositors and to simplify procedure : and, in particular, regulations framed originally for post office savings banks have been adapted for use by these banks, so far as they relate to withdrawals from the

(*k*) Act of 1893, s. 2.
(*l*) *Ibid.*
(*m*) Act of 1863, s. 15.
(*n*) 51 & 52 Vict. c. 15 (National Debt (Supplemental) Act, 1888).
(*o*) A reduction to 2*l.* 7*s.* 6*d.* is probable.

accounts of infants and lunatics, transfers from one account to another, nominations to receive sums due to a depositor at his decease, and the payment of deposits of deceased depositors, the trustees having power to distribute the amount due to the depositor in cases where the account does not exceed 100*l.* exclusive of interest, if probate or letters of administration are not produced within a reasonable time. All deposits made by a married woman were, by the provisions of the Act (*p*), to be paid to such woman herself, unless her husband gave notice of the marriage, and required payment thereof to be made to him ; but, under the Married Women's Property Acts, 1870 and 1882, any deposit in a savings bank, made after the 9th August, 1870, in the name of a married woman, or in the name of a woman who shall marry after such deposit, is to be deemed her separate property, and to be accounted for and paid over to her, as if she were an unmarried woman. Upon the same principle of convenience and economy, the Savings Banks Acts have provided, that all disputes between the trustees and managers and any depositor or his representatives shall be referred to the arbitrator appointed by the Acts for that purpose ; and under the Savings Banks (Barrister) Act, 1876 (39 & 40 Vict. c. 52), the arbitrator, in the case of all such disputes, is now the Registrar of Friendly Societies (*q*).

All persons forming themselves into a society for the purpose of establishing a savings bank, are entitled to claim for it the benefit of these parliamentary provisions, upon causing their rules and regulations to be entered in a book, to be kept by one of its officers for the inspection of depositors. These rules and regulations must still be certified by the barrister appointed for that purpose (*r*) as being in conformity with law and with the Savings Banks Acts ; but the Registrar of Friendly Societies is now the

(*p*) Act of 1863, s. 31.

(*q*) *R.* v. *Mildenhall Savings Bank* (1837), 6 A. & E. 952 ; *R.* v. *Northwich Savings Bank* (1839), 9 A. & E. 729.

(*r*) Act of 1863, s. 4.

barrister appointed for that purpose (*s*). Moreover, the formation of any savings bank established after the 28th July, 1863, must be sanctioned by the National Debt Commissioners (*t*), to whom, in some important respects, all Trustee Savings Banks are subject (*u*). But it is not lawful for any Trustee Savings Bank to purport (by its name or otherwise), that the Government is responsible or liable to its depositors for the moneys deposited (*x*); and every such bank is now required to describe itself as a "savings bank certified under the Act of 1863" (*y*).

The success of Trustee Savings Banks induced Parliament to institute a new kind of savings bank under the management of the Post Office. The Post Office Savings Bank was established in the year 1861 under the Post Office Savings Bank Act, 1861 (*z*), and the depositors in it enjoy the advantage of the direct security of the Government for the repayment of their deposits. That Act authorizes the postmaster-general, with the consent of the treasury, to cause his officers to receive deposits for remittance to the principal office; and to repay the same, under such regulations as shall from time to time be prescribed (*a*). Each depositor is to receive from the postmaster-general, through the branch office at which the deposit is made, an acknowledgment of its amount, which shall be conclusive evidence of his claim to repayment within ten days after demand, with interest thereon at the rate of 2*l*. 10*s*. per cent. per annum (*b*). The moneys deposited are to be forthwith paid over to the

(*s*) Act of 1876, s. 2.

(*t*) Act of 1863, s. 2.

(*u*) Act of 1876, s. 2; Act of 1887.

(*x*) Act of 1891, s. 1.

(*y*) *Ibid.*

(*z*) 24 & 25 Vict. c. 14. This statute has been since amended by the 26 & 27 Vict. (1863), c. 14; 37 & 38 Vict. (1874), c. 73; 43 & 44 Vict. (1880), c. 36; 50 & 51 Vict. (1887), c. 40; 54 & 55 Vict. (1891), c. 21; and 56 & 57 Vict. (1893), c. 69, which by s. 9 (3) gives to these statutes the collective title of Post Office Savings Bank Acts.

(*a*) Act of 1861, s. 1.

(*b*) Sects. 2, 3, 7.

National Debt Commissioners (*c*), to be by them invested in such securities as are lawful for the funds of Trustee Savings Banks (*d*); and if at any time the funds so created shall be insufficient to meet the lawful claims of all depositors, the treasury is empowered to make such deficiency good out of the consolidated fund (*e*). The Act further provides, that the accounts, both of the postmaster-general and of the commissioners, in respect of all moneys deposited with or invested by them respectively under the Act, shall be audited by the comptroller general of the exchequer and auditor general of the public accounts (*f*); and that an account of all deposits received and paid during the current year shall be submitted to both houses of parliament (*g*). The Act contains also provisions enabling any person, who has made a deposit under it, to transfer the amount to any Trustee Savings Bank; and for the transfer, on the other hand, of the amount due to any depositor in any Trustee Savings Bank, to the Post Office Savings Bank (*h*).

The older form of Trustees Savings Bank has the double advantage of secrecy and celerity. Deposits may be paid out without notice. But although deposits in these banks have increased, the savings deposited with the Post Office are much larger, amounting in 1900 to 135,550,000*l*., as against 51,455,000*l*. in the Trustee banks.

In connection with these institutions, it may be here noticed, that, by the Government Annuities Acts, 1853, 1864, 1882, and 1888, the National Debt Commissioners may grant to any depositor in any savings bank, or other person whom they shall think entitled to be regarded as a depositor, an *immediate* or *deferred* life annuity depending on a single life, or an *immediate* annuity depending on

(*c*) Sect. 5.
(*d*) Sect. 9.
(*e*) Sect. 6.
(*f*) Sect. 13; Exchequer and Audit Departments Act, 1866, s. 5; Act of 1880; and Government Annuities Act, 1882.
(*g*) Act of 1861, s. 12; Act of 1874, s. 3.
(*h*) Act of 1861, s. 10.

joint lives with benefit of survivorship, or depending on the joint continuance of two lives, or a sum (not exceeding 100*l.*) to be paid on the death of any person,—such powers being exercised, so far as regards insurances, solely through the medium of *Post Office* savings banks.

The Acts relating respectively to Trustee Savings Banks and to the Post Office Savings Bank have therefore much in common, and the regulations made or sanctioned by the treasury thereunder present also great similarity; and the necessity of distinguishing between the provisions and regulations respectively applicable to each has been reduced by the provision of the Savings Banks Act, 1887 (50 & 51 Vict. c. 40), ss. 1, 2, whereby certain regulations applicable to the Post Office Savings Bank may be made applicable to Trustee Savings Banks. Moreover, a Trustee Savings Bank is now placed (as regards the integrity of its management) practically as effectively under control as the Post Office Savings Bank necessarily is; provision having been made, by the Trustee Savings Banks Act, 1887 (50 & 51 Vict. c. 47), for the appointment by the High Court of Justice, on the application of the treasury, of a commissioner to examine into the state of the affairs of any Trustee Savings Bank, on any *primâ facie* case made for such an examination (*i*). And by the Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 2, inspectors of savings banks have also been appointed. Also, in a proper case, such a savings bank may be ordered to be wound up, as an unregistered association, under the Companies Acts, 1862—1900 (*k*).

(*i*) Sect. 2.

(*k*) Trustee Savings Banks Acts, 1863, s. 3; 1891, s. 6.

CHAPTER XIII.

OF THE LAWS RELATING TO LUNATIC ASYLUMS, AND THEIR MANAGEMENT.

We have had occasion elsewhere to explain the general state of the law with reference to idiots and lunatics (*a*); we now proceed to consider more fully the numerous provisions made by the legislature for the reception, detention, and care of idiots and lunatics, in lunatic asylums or other institutions.

Houses established for the reception of insane persons are of various descriptions, some being established and maintained for the public benefit and at the public expense, others, like the Royal Hospital of Bethlehem (*b*), having been established and endowed for the public benefit by charitable donors, and others, again, being private houses kept by individuals for their own profit. But every house, of whatever kind or class, used for the reception of lunatics is subject in a greater or less degree to public control. For the purpose of exposition it will be convenient to divide the subject into three parts, and to treat (1) Of lunatic asylums in counties and boroughs; (2) Of criminal lunatics; and (3) Of the treatment of lunatics in general (including idiots). Habitual drunkenness, it should be observed, may now be treated much in the same manner as lunacy, under the provisions of the Inebriates Acts, 1879 to 1899 (42 & 43 Vict. c. 19; 51 & 52 Vict. c. 19; 61 & 62 Vict. c. 60; and 62 & 63 Vict. c. 35). Under those Acts "retreats" and "inebriate

(*a*) *Vide sup.* vol. I. p. 278; vol. II. pp. 507—511.

(*b*) Cf. 25 & 26 Vict. (1862), c. 104, s. 5.

"reformatories" (*c*) may be established for the reception of drunkards, dipsomaniacs, and the like.

1. *Lunatic Asylums.*—County lunatic asylums were first established in the year 1808, by the 48 Geo. III. c. 96; from 1853 to 1890 they were regulated by the Lunatic Asylums Act, 1853, and a number of amending statutes. But all these were repealed, and their provisions (with amendments) consolidated, by the Lunacy Act, 1890 (*d*), which, however, has also in its turn been amended, in some few particulars, by the Lunacy Act, 1891 (*e*).

By the provisions of the earlier Lunacy Acts, it was made incumbent on the justices of every county, to provide a sufficient asylum for its *pauper* lunatics, either separately or in union with other local authorities or voluntary bodies—the expenses of such an asylum, so far as they were not covered by voluntary contributions, being defrayed out of the county rates, and its management vested in a *committee of visitors*, elected yearly by the justices, or partly by the justices and partly by the subscribers. The provision, enlargement, maintenance, management, and visitation of those asylums was part of the business which, by the Local Government Act, 1888 (*f*), was transferred to the administrative councils of counties and county boroughs created by that Act; and every county and county borough council is now a "local

(*c*) These reformatories are either *state inebriate reformatories* (when established by the government), or *certified inebriate reformatories* (when established by private persons). Act of 1898, ss. 3, 5.

(*d*) 53 Vict. c. 5. The provisions applicable to *county* lunatic asylums are applicable also (*mutatis mutandis*) to lunatic asylums established in *boroughs*; also, the boroughs may, and in certain cases must, unite with the county in which they are situate, in the establishment and maintenance of an asylum.

(*e*) 54 & 55 Vict. c. 65.

(*f*) 51 & 52 Vict. c. 41, s. 3 (vi.)—"The provision, enlargement, maintenance, management, and visitation of, and other dealing with, asylums for pauper lunatics."

authority" charged, by the Lunacy Act, 1890 (*g*), with the provision and maintenance of county and borough asylums (*h*).

These pauper lunatic asylums are supplementary, in a sense, to the administration of the poor law. They became necessary after the provision of the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), s. 45, whereby it was made penal to confine any insane person, having dangerous tendencies, for more than fourteen days, in any workhouse. By the Lunacy Act of 1862 (25 & 26 Vict. c. 111), s. 20, it was further provided, that no lunatic should be detained in the workhouse for more than that period, unless under a certificate from the proper medical officer. But, by sect. 25 of the Act of 1890, pauper lunatics discharged from asylums, hospitals, or licensed houses, may now, in proper cases, be detained as lunatics in workhouses for indefinite periods.

The provisions of the earlier Acts for the reception of pauper lunatics into asylums were briefly as follows:— Any relieving officer of a parish, and every overseer of a parish where there was no relieving officer, who had knowledge that any pauper resident in such parish was deemed to be a lunatic, might give notice thereof to some justice of the county, who thereupon made an order for the pauper to be brought before him or before some other justice of the county. The justice before whom the pauper was brought called in medical aid; and if, upon examination of the pauper, the medical man certified that the pauper was insane, the justice might make an order, directing the pauper to be received into the asylum of that county, or, under special circumstances, into some other asylum, or into a hospital or house for lunatics, such hospital or house being duly registered or licensed. Also, any justice, acting upon his own knowledge, and without any notice as above, might examine any pauper deemed

(*g*) Sect. 239. (*h*) Sect. 238.

to be a lunatic, at his own abode or elsewhere ; and, after such examination, might proceed in all respects as if the pauper had been brought before him in a more formal way. Moreover, if a pauper deemed to be a lunatic could not, on account of his health, or other cause, be conveniently taken before any *justice* for examination, he might be examined by some clergyman officiating in the parish, in company with the relieving officer or overseer ; and in such case, the order for his reception into an asylum might be made, conjointly, by such clergyman and relieving officer or overseer. These provisions are, in the main, adopted by the Act of 1890 (*i*) ; but, as the law now stands, pauper lunatics may no longer, apparently, under any circumstances, be received into any asylum, hospital, or licensed house, save on a "reception "order" or "summary reception order" of a justice (*k*), or of the chairman of the board of guardians, if duly authorized by the Lord Chancellor to sign such reception order (*l*). And a justice is now, in no case, to sign such reception order for an alleged pauper lunatic, without first satisfying himself, that the alleged pauper either is in receipt of relief, or is in such circumstances as to require relief (*m*).

Besides pauper lunatics, *any* lunatic (whether resident in the county or not) who, on examination by two justices assisted by a medical man, was found to be *meditating crime*, might be sent to and detained in the county (or borough) asylum. And now, under the provisions of the Lunacy Act, 1890, s. 13 (*n*), lunatics (not being pauper lunatics) who are not under proper care or control, or who are cruelly treated or neglected by the person having charge of them, may, on the sworn information of a constable, relieving officer, or parish overseer, be personally visited by a justice, who shall authorize and direct two

(*i*) Act of 1890, ss. 13—21.
(*k*) *Ibid.* ss. 13, 14, 16, 315.
(*l*) Act of 1891, s. 25.
(*m*) Act of 1890, s. 18.
(*n*) See also Act of 1891, s. 2 (2)

medical practitioners to visit and examine them, and to certify as to their mental condition ; and the justices may in a proper case, and on the certificates of such medical practitioners, cause the lunatic to be confined either in a pauper asylum or in a hospital or licensed house, unless the person in charge of the lunatic satisfies the justice that he will take proper care of him. And in such cases, the medical certificates must now be attached to the reception order (*o*).

The earlier Acts also provided for the admission into the lunatic asylum of any county or borough, of the pauper lunatics of any other county or borough, or even of lunatics who were not paupers (*p*) ; but as regards lunatics who were not paupers, the visitors might prescribe, as a condition of their admission, that the person applying for the admission should give an undertaking to pay for the lodging, maintenance, and other necessaries to be provided for the lunatic in the asylum. These provisions are maintained in the Lunacy Act, 1890 (*q*). Under that Act, however, and therefore under the existing law, every justice is not a "judicial authority." The powers of a "judicial authority" under the Lunacy Act may be exercised either by one of the justices specially appointed at the Michaelmas quarter sessions in counties, and at a special sessions held in boroughs in October, or by a county court judge, or by a stipendiary or police magistrate. A justice who is a judicial authority under the Lunacy Acts may act without having jurisdiction in the place where the alleged lunatic is (54 & 55 Vict. c. 65), s. 24.

The maintenance of every pauper lunatic is of course chargeable to the poor rate, being the poor rate of the parish or union from which he is sent, or to which he belongs (*r*). If the pauper's settlement cannot be ascer-

(*o*) Act of 1891, s. 5.
(*p*) Act of 1853, s. 43.
(*q*) Act of 1890, ss. 269—271.
(*r*) Sects. 286—298.

tained, two justices may, under certain circumstances, adjudge him to be chargeable to the "local authority," *i.e.*, the council of a county or borough (*s*). By the Local Government Act, 1888 (*t*), the administrative county councils established under that Act are required to provide in whole or in part for all pauper lunatics, according to their chargeability, either from the Exchequer Contribution Account spoken of in a former chapter (*u*), or both from that and also from the general rates for the administrative county. But, under the Lunacy Act, 1890, any property of the lunatic, if more than sufficient for the maintenance of his family, may, by order of a justice (s. 299), or of a county court judge (s. 300), be made available to recoup the expenses of his maintenance.

Stringent provision is made, by the Lunacy Act, 1890, against the wrongful detention of persons as lunatics, it being provided by the Act that no person (other than a criminal lunatic, or a pauper lunatic, or a lunatic wandering at large, or a lunatic so found by inquisition) shall, excepting in cases of urgency, be received or detained as a lunatic in any asylum, hospital, or licensed house, or as a single patient, unless under the reception order of a county court judge or magistrate or justice of the peace (*x*). A reception order is to be obtained on private application by petition, accompanied by a statement of particulars, and two medical certificates under the hands of two medical practitioners (s. 4). The judge, magistrate, or justice may himself visit the alleged lunatic to satisfy himself as to the lunacy (s. 6). And the reception order, with the medical certificates attached, is a sufficient authority for the petitioner (within seven clear days from its date)

(*s*) Act of 1890, ss. 240, 290.

(*t*) 51 & 52 Vict. c. 41, ss. 3, 24 (2) (e) and (6), 32, 36, 38, and 86.

(*u*) *Supra*, p. 39.

(*x*) Being, as above mentioned, a "judicial authority" under the Act, *i.e.*, one of the committee appointed for this purpose by the justices of the county or quarter sessions borough. (Sect. 10.)

to take the lunatic to the place mentioned in the order for his reception and detention (s. 36). In cases of urgency, the lunatic may be received and detained under an "urgency order" made at the request of the husband, wife, or other near relative of the lunatic, the request being accompanied with a medical certificate under the hand of a medical practitioner, who has personally examined the lunatic within two days before signing such certificate (s. 11). But the Act gives the lunatic the right of appealing in certain cases against the order for his reception or detention (s. 8), such appeal being to another "judicial authority." The Act contains also minute provisions for the protection of persons from being wrongfully confined as lunatics by their relatives; and, with a view to ascertaining whether or not the detention of persons as lunatics is in the first instance lawful, the Act specially provides, that within one month after the reception of a lunatic the medical superintendent, medical proprietor, or medical attendant, as the case may be, who has charge of him, shall report as to his mental and bodily condition to the Commissioners in Lunacy (s. 39). Thereupon those Commissioners (or one or more of them) are to visit the lunatic; and the Visitors in Lunacy are also to visit him if he is detained as a private patient in a licensed house within their district (s. 39). And, according to the true state of the alleged lunatic, he may be either discharged from or continued in detention (s. 39). The Act also provides, that reception orders shall in general continue good for one year only, but may (where necessary) be continued for two years, and again for three years, and again for five years; after which they may be continued for successive periods of five years (s. 38). These orders are now continued, and successively continued, for the periods aforesaid automatically, that is to say, merely upon the medical officer or medical attendant, who has the lunatic in his charge, specially

reporting to the Commissioners from time to time, as prescribed, that the lunacy still continues (*y*); but the Commissioners may, at any period of the detention of the lunatic, visit him, and, if he is detained without sufficient cause, they may order his discharge (s. 38). Also, any one, whether a relative or not of the alleged lunatic, may obtain an order from the Commissioners for the examination of the lunatic by two medical practitioners authorized by the Commissioners; and on the certificate of such practitioners, the Commissioners may in a proper case order the discharge of the alleged lunatic (s. 49). Any alleged lunatic (being a pauper lunatic) may, in a proper case, and upon an order of the committee of visitors, be delivered over to relatives or friends willing to take care of him (s. 57); and these latter may in such case receive an allowance from the Poor Law authority towards the cost of his maintenance. The Act also provides, that lunatics detained by persons receiving no payment therefor, or deriving no profit therefrom, or lunatics who are detained in charitable or other like institutions (not being asylums, hospitals, or licensed houses), may be discharged or removed to an asylum, hospital, or licensed house, by order of the Lord Chancellor, upon a report as to their condition transmitted to him by the Commissioners (s. 206). And there are also many other provisions contained in the Act which have for their object the comfort and humane treatment of lunatics during the period of their detention (*z*), including the proper management of asylums, hospitals, and licensed houses, and their enlargement when necessary. In case a lunatic who is lawfully detained escapes, he may be retaken in England,

(*y*) Act of 1891, s. 7.

(*z*) Female (and not male) attendants are to have the personal charge of female lunatics (sect. 53), unless in cases of urgency; and having carnal intercourse with any such lunatic, whether she consent or not, is an offence punishable with imprisonment, for two years, with or without hard labour. (Sect. 324.)

Scotland, or Ireland, on the warrant of a justice of the peace, to be obtained by any person in that behalf authorized by the Commissioners (ss. 85—89).

II. *Criminal Lunatics.*—A criminal lunatic may be defined as a person who is found to have committed a crime while "labouring under such a defect of reason, "from disease of the mind, as not to know the nature and "quality of the act he was doing; or if he did know it "that he did not know he was doing what was wrong" (*a*). The Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), which repeals and consolidates (with amendments) the earlier general Acts upon the subject (*b*), provides, that where it appears to any two members of the visiting committee of a prison that a prisoner in such prison (not being under sentence of death) is insane, they shall call to their assistance two legally qualified medical practitioners, to examine the prisoner and inquire as to his insanity; and after such examination and inquiry, they may certify in writing that the prisoner is insane. As regards any prisoner who is under sentence of death, if it appears to the Secretary of State, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State is to appoint two or more legally qualified medical practitioners to examine the prisoner and inquire as to his insanity. Upon a certificate of insanity being given, in either case, the Secretary of State may, if he thinks fit, issue his warrant for the removal of such prisoner to the asylum named in the warrant, and the prisoner is to be received into such asylum accordingly; and, subject to the provisions of the Act relating to his conditional discharge and otherwise,

(*a*) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200. *Cf.* Act of 1884, ss. 2, 16.

(*b*) The Criminal Lunatics Acts, 1840 to 1869 (3 & 4 Vict. c. 54; 27 & 28 Vict. c. 29; 30 & 31 Vict. c. 12; and 32 & 33 Vict. c. 78).

he is to be detained therein, or in any other asylum to which he may be transferred in pursuance of the Act, as a criminal lunatic, until he ceases to be a lunatic (*c*). Should the criminal lunatic at any time afterwards be certified to have become sane, he is to be remitted to prison, by warrant of the Secretary of State, there to complete his sentence (*d*); but as regards any such criminal lunatic found to have been insane at the date of the commission of the offence, the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2, provides, that, the jury having first returned a special verdict to that effect, the court shall order the accused to be kept in custody as a criminal lunatic, in such place as the court shall direct, during his Majesty's pleasure.

The proper prison for persons removable under the provisions of the Acts relating to criminal lunatics, is some asylum appropriated by law for the custody and care of such criminals as shall become insane during their imprisonment, or of such persons as shall be acquitted at their trial on the ground of insanity, under the Criminal Lunatics Act, 1800; for the Criminal Lunatic Asylums Act, 1860 (amended by the Criminal Lunatics Act, 1884), provides, that his Majesty may, from time to time, by warrant under his royal sign manual, appoint that any asylum or place in England which has been provided for the purpose, shall be an *asylum for criminal lunatics*, and that the Secretary of State may from time to time appoint a council of supervision thereof, and also a resident medical superintendent, chaplain, and such other officers and servants as he shall think necessary, and may frame such rules for its guidance and management, as may be required (*e*). The Secretary of State may also, at any time, order the discharge of any such criminal prisoner, either absolutely

(*c*) Act of 1884, ss. 2, 10; *Bradford Union* v. *Wilts* (1868), L. R. 3 Q. B. 604. Section 9 of the Act deals with the transfer of a lunatic from a criminal to an ordinary asylum.

(*d*) Act of 1884, s. 3.

(*e*) Act of 1860, ss. 1, 4 and 5.

or on conditions, and, if the conditions be broken, may cause the prisoner to be recaptured (*f*); and he may also permit any such criminal prisoner to be absent on probation, from his place of confinement, on such conditions as he may think fit. The Act contains provisions for the contingency of the term of punishment awarded to any criminal, who shall become lunatic, expiring before he recovers the use of his reason (*g*); and also provisions for the care of such criminal lunatics as shall be or become pauper lunatics (*h*).

III. *The Treatment of Lunatics and of Idiots.*—The provisions which have been made to secure the proper treatment of lunatics in general may be stated as follows. In addition to the provisions of the Lunacy Act, 1890, above stated, regulating their original reception and subsequent detention, and providing against their wrongful confinement, and for their humane treatment during their lawful confinement, it has been provided by the same Act (repealing but re-enacting the like provisions contained in previous statutes), that it shall be a *misdemeanor* for any person to receive two or more lunatics into any house, not being a county or borough lunatic asylum, which is not either a hospital duly registered, or some house duly licensed for the reception of lunatics (*i*); but *one* lunatic may be so received (*k*). And hospitals wherein lunatics are to be received, must be registered with the sanction of the Commissioners of Lunacy (a board of persons comprising medical men and barristers, originally established by the Lunacy Act, 1845, s. 3, and continued by the Lunacy Act, 1890, s. 150). Licences for keeping houses for such purpose are granted by the same commissioners, at a quarterly or special meeting of the board, for Middlesex, London, Westminster, Southwark, and all places within the range

(*f*) Act of 1884, s. 5.
(*g*) *Ibid.* s. 6.
(*h*) *Ibid.* s. 7.
(*i*) Act of 1890, s. 315.
(*k*) *Ibid.*

of seven miles from any part of London, Westminster, or Southwark. In other places, licences for keeping such houses (the houses having been first inspected by the commissioners) may be granted by the justices in general or quarter sessions assembled (*l*) ; but the licence is in no case to be for a period exceeding thirteen calendar months, and must therefore be periodically renewed (*m*). The Lunacy Act, 1890, contains also minute provisions, for the effectual superintendence of all such registered hospitals and licensed houses ; requiring, *e.g.*, that the keepers of such hospitals and houses shall report the admission, death, removal, discharge, or escape of any patient, and shall provide the patients with proper medical attendance (*n*) ; also, that all such patients shall be visited by the commissioners, or (in the country) by special visitors appointed by the magistrates (*o*), and that special visits may in particular cases be directed (*p*) ; and that reports shall be made by the visitors to the commissioners, and by the commissioners to the lord chancellor, of the state of the several houses visited by them, and as to the care taken of the patients therein (*q*). Moreover, a person detained in a licensed house or hospital without sufficient cause may, by the commissioners, be set at liberty (*r*) ; but this power does not, of course, extend to enabling the commissioners to order the discharge of a person found lunatic under a *commission*, or of one who is in confinement by order of the secretary of state, or under the order of any court of criminal jurisdiction. The commissioners may also visit all *asylums* and *gaols* and *workhouses* where any lunatics are confined, and inquire into the condition, system, and regulations of such asylums, gaols, and workhouses ; and in the case of workhouses,

(*l*) Act of 1890, s. 208, and 3rd Schedule.

(*m*) Sects. 207, 216.

(*n*) Sects. 43—52.

(*o*) Sects. 163—168, 169—176, and 177—182.

(*p*) Sect. 204.

(*q*) Sects. 162, 184.

(*r*) Sects. 72—78.

they report thereon to the Local Government Board. And generally, the lord chancellor, in the case of lunatics under the care of committees, and either the lord chancellor or the home secretary, in the case of other persons under restraint as lunatics, may direct the commissioners or any special commissioner to visit the lunatic, and to inquire into such matters as are directed by the order, and to report to him the result of the inquiry.

Idiots, as distinguished from *lunatics*, may also be received in registered hospitals and licensed houses ; the Idiots Act, 1886 (49 Vict. c. 25), having enacted, that idiots may be received into, and be detained in, such places, on the certificate in writing of a duly qualified medical practitioner, accompanied with a statement of the idiot's parent or guardian, certifying as to his general condition and treatment. And for securing the proper treatment of idiots while so detained, provisions similar to those applicable to lunatics confined in such places are, with but few exceptions, applicable also to idiots,—the provisions of the Idiots Act, 1886, in these particulars not having been affected in any way by the Lunacy Act, 1890 (*s*).

(*s*) 53 Vict. c. 5, s. 340.

CHAPTER XIV.

OF THE LAWS RELATING TO PRISONS.

By the Assize of Clarendon, in the reign of Henry II., provision was first made for the erection of gaols in each county, wherein the sheriff might lodge prisoners. In 1402 (by 5 Hen. IV., c. 10), it was enacted, that justices should only imprison men in "the common gaol." In the seventeenth and eighteenth centuries, the provision of better gaols was made a charge on the county. In the nineteenth century the prison system was completely reformed, its cost and management being transferred almost entirely from the local authorities to the central government. A prison may not be erected, save by the authority of parliament (*a*); and when once erected, it belongs to the king (*b*), as representing the executive government of the country. Moreover, the gaoler, governor, keeper, or other chief officer of a prison was formerly, in contemplation of law, considered merely as the deputy of the sheriff of the county or place in which the prison was situate; and consequently, if he negligently suffered a prisoner to escape out of his custody, the sheriff (as his principal) was held responsible. Under the existing law, however, every prisoner is deemed to be in the legal custody of the gaoler himself, so that the sheriff is no longer liable for his escape (*c*). And every prison officer has the privileges of a constable.

(*a*) 2 Inst. 705; Bac. Abr. Gaol. (A.); *R.* v. *Justices of Lancashire* (1839), 11 A. & E. 144.

(*b*) 2 Inst. 589.

(*c*) Prison Act, 1865, s. 58; but cf. Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 16.

There is a species of prison which is termed, by way of distinction from a gaol properly so called, a house of correction, or (in the city of London) a bridewell, and sometimes a penitentiary (*d*). Houses of correction were established in the reign of Elizabeth, and were originally designed for the penal confinement of paupers refusing to work, and of other persons falling under the legal description of *vagrants* (*e*); and at first this was the only purpose for which houses of correction might be used, the common gaol having long been the only legal place of commitment for persons convicted of offences or awaiting their trial (*f*). Eventually, however, by the Prisons Act, 1835, ss. 3, 4, it was enacted, that either a justice of the peace, or a coroner, might commit prisoners awaiting their trial to any house of correction situate near the place where the assizes or sessions were to be held, at which they were to be tried; and subsequently "police stations" and "lock-up" houses were successively established, for the temporary detention of persons charged with offences.

It was, however, still provided, by the Criminal Justice Administration Act, 1851, ss. 20, 21, that every prisoner committed in the first instance otherwise than to the common gaol should be, in due course, removed to the common gaol to take his trial. But the importance of the distinction between gaols and houses of correction has now been in a great measure done away with, by the Prison Act, 1865 (*g*), which enacts, that (subject to the provisions of that Act with respect to the appropriation of prisons to different classes of prisoners) every prison to which the Act applies shall be deemed to be both a gaol and a house of correction (*h*). The Prison Act, 1877, gives the secretary of state a general authority to appoint the particular prisons in which prisoners shall be confined, both before

(*d*) Prison Act, 1865, s. 4.
(*e*) 39 Eliz. (1597), c. 4.
(*f*) 5 Hen. 4 (1402), c. 10; 23 Hen. 8 (1531), c. 2.
(*g*) 28 & 29 Vict. c. 126.
(*h*) Sect. 56.

and during their trial, and after conviction (*i*) ; moreover, prisoners may be removed from one prison to another, for the purposes of their trial. In the Prison Act, 1898 (*k*), the expression "local prison" is used, and means "any prison to which the Prison Acts, 1865 to 1893, apply."

The maintenance and government of prisons is now mainly provided for by the Prison Acts, 1865, 1877, 1884, 1893, and 1898, by which five Acts the statute law on this subject has been in some measure consolidated. By the Prison Act, 1865, every place having a separate prison jurisdiction (*i.e.*, speaking roughly, every county, riding, hundred, liberty, borough, or town) was placed under the legal liability of providing, at its own expense, adequate accommodation for its own prisoners ; and the duty of seeing that this result is attained was entrusted to the *prison authority*, that is to say, the justices of the county, the council of the borough, or otherwise, as the case may be (*l*). But, in the counties, this duty has been transferred from the justices to the county council, by the Local Government Act, 1888 (*m*). The Prison Acts make careful provision for the religious instruction of prisoners during the period of their incarceration, enacting that there shall be appointed a chaplain and, if necessary, an assistant chaplain for each prison, both being clergymen of the Established Church, and duly licensed in that behalf by the bishop (*n*) ; further, a chapel, or suitable room, is to be provided in every prison, in which prayers (selected from the liturgy of the Established Church) and portions from the Scriptures may be read daily, either by the chaplain himself, or by the gaoler, or by some other person selected for the purpose. For prisoners who do

(*i*) 40 & 41 Vict. c. 21, ss. 24, 25.

(*k*) 61 & 62 Vict. c. 41.

(*l*) Sect. 5. A place has a "separate prison jurisdiction" which either in fact maintains, or (but for other accommodation being provided for it) would be liable at law to maintain, a separate prison for itself. (Sect. 9.)

(*m*) 51 & 52 Vict. c. 41, s. 3.

(*n*) Prison Act, 1865, ss. 10, 13.

not belong to the Established Church, a minister of the persuasion to which such prisoners belong may be appointed, and a reasonable recompense awarded to him for his services (*o*). All prisoners are required to attend divine worship, and those who desire it may receive additional religious and moral instruction.

For the general management of prisons, and their maintenance, and the discipline to be exercised by the prison officials over the prisoners, very exact and minute provisions have been laid down in the Prison Acts, more particularly in the Prison Acts, 1865, 1877, and 1898. Under the Act of 1877, all the expenses incurred in the maintenance of those prisons to which the Act applies (that is to say, all prisons which belong to any "prison authority" as defined by the Act of 1865), as well as the expense of keeping the prisoners therein, are to be defrayed out of moneys to be provided by parliament, instead of as theretofore by local rates; and the continuance or discontinuance of any particular prison or prisons, the appointment of all prison officers, the control and safe custody of the prisoners, and all powers and jurisdictions exercisable by prison authorities, or by the justices in sessions assembled, in relation to prisons within their jurisdiction, are thereby entrusted or transferred to the secretary of state (*p*). To assist the secretary of state in the due execution of this part of his office, the Act of 1877 established a Board of Prison Commissioners, in whom (subject to his control) the general superintendence of all prisons under the Act is vested. The Prison Commissioners are now, also, by virtue of their office, directors of convict prisons (*q*), and are to be

(*o*) Sched. I., No. 47; Sched. III.

(*p*) Act of 1877, ss. 4, 5; *Mullins* v. *Treasurer of Surrey* (1880), 6 Q. B. D. 156.

(*q*) Act of 1898, s. 1. The Directors of Convict Prisons were formerly a separate body, charged with the special superintendence of prisons used for the reception of convicts serving sentences of penal servitude. They were amalgamated with the Prison Commissioners by the Act of 1898.

assisted by inspectors and other officers (*r*) : and they, or their officers, are to visit and inspect the different prisons, and examine into the state of the buildings, the conduct of the officers, the treatment and conduct of the prisoners, their labour and earnings (*s*), and similar matters, and inquire into all alleged abuses. The specific powers and jurisdictions conferred upon "visiting justices," either at common law or by charter or statute, have been transferred to the Prison Commissioners, who are to make from time to time reports upon each prison to the secretary of state : and their annual report is to be laid before both houses of parliament (*t*). Under the Prison Act, 1884, the secretary of state may, with the approval of the Treasury, alter, enlarge, or rebuild any prison ; or build any new prison ; or appropriate for a new prison any building or part thereof vested in him (*u*) ; and thereupon may declare such new prison to be a prison under the Prison Acts, and to be within the jurisdiction of the Prison Commissioners, and to be a prison for the county, or other prison jurisdiction, named in the declaration.

The Act of 1898 regulates the corporal punishment which may be inflicted on convict prisoners for prison offences ; and enacts, that such punishment shall not be inflicted (unless for mutiny or incitement to mutiny, or unless for gross personal violence to any prison official) in any cases save two, viz., (1) in the case of offences committed by prisoners who have been convicted of felony, or

(*r*) Act of 1877, ss. 6, 7 ; Act of 1898, s. 1.

(*s*) It being supposed that prison-made goods interfere with the sale of goods manufactured out of prison, it has been recently enacted that goods made in foreign prisons may be excluded from importation (Foreign Prison-made Goods Act, 1897).

(*t*) Act of 1877, s. 10. The "visiting justices" appointed by the Prison Act, 1865, are now represented by the "visiting committee of justices" ; and the visiting committee exercise such duties as are from time to time delegated to them by the secretary of state (Act of 1877, ss. 13—15).

(*u*) Sect. 2.

who have been sentenced to penal servitude or to hard labour ; and (2) in the case of offences duly established after a fair trial before a special tribunal appointed for the purpose (*x*). The Act contains also provisions for the separation of prisoners of different degrees or qualities (*y*) ; and it enacts, that prisons need not have punishment cells, but only special cells for the temporary confinement of refractory or violent prisoners (*z*), and some few other provisions of the like humane character.

(*x*) Act of 1898, s. 5.
(*y*) Sect. 6.
(*z*) Sect. 7.

CHAPTER XV.

OF THE LAWS RELATING TO HOUSES OF PUBLIC RECEPTION AND ENTERTAINMENT.

THE matters which next demand our consideration are the laws which relate to Public Houses and to Theatres.

1. *Public Houses.*—By a public house is usually meant a house licensed for the sale and consumption of alcoholic liquor on the premises. The enactments relating to public houses are of two kinds,—the one aiming at *revenue*, the other at securing the proper *police* regulation of these places, and the prevention of the abuses to which they are peculiarly subject. And as we have in a previous volume already sufficiently discussed such of these enactments as relate to the Revenue or Excise, we will here only mention, that any person selling any "excisable liquor," such as wine, spirits, beer, cider, or perry, by retail, without a licence is liable under a number of Acts to a great variety of pecuniary penalties, and in some cases to a term of imprisonment. There are separate excise penalties, and a distinction is made between the offences of persons partly licensed and persons unlicensed (*a*). The enactments which relate to the police regulation of public houses commence as early as the reign of Edward the Sixth (*b*), but the chief of those now in force are the Alehouse Act, 1828 (9 Geo. IV. c. 61), the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), the Wine and Beerhouse Act Amendment Act, 1870 (33 & 34 Vict.

(*a*) See complete table of offences with penalties, and the statute under which each offence is punished, in Paterson, *Licensing Acts* (15th ed.), pp. lxxvii.—c.

(*b*) 5 & 6 Edw. 6 (1552), c. 25.

c. 29), the Licensing Act, 1872 (35 & 36 Vict. c. 94), as amended by the Licensing Acts of 1874, 1884, and 1902, the Inland Revenue Act, 1880, and the Intoxicating Liquors (Sale to Children) Act, 1901 (*c*).

Under these Acts, every keeper of an inn, alehouse, or victualling house, wherein is sold wine, spirits, beer, cider, perry, or other exciseable liquors, by retail, to be consumed either *on* or *off the premises*, must, in addition to his excise licence (*d*), obtain a licence from the *justices* having jurisdiction in the place where the house is situate (*e*); and such licence is applied for at the

(*c*) The subject of licences for music and dancing requires a separate note. The Disorderly Houses Act, 1751 (as amended by the Public Entertainments Act, 1875 (38 & 39 Vict. c. 21)), required every house, room, garden, or other place, kept in London or Westminster, or within a circuit of twenty miles, for public dancing, music, or other public entertainment of the like kind, to be licensed by the magistrates at quarter sessions under the penalty of being deemed a "disorderly house"; and over the doors of such places, there must have been affixed and kept the words "Licensed pursuant to Act of Parliament of the twenty-fifth of King George the Second." Such houses and places were not (as a general rule) allowed to be opened for the purpose of public entertainment before the hour of noon. But most of the above area is contained in the county of London; and under the Local Government Act of 1888 (s. 3), the licensing of these houses within its area was transferred to the London County Council. Moreover, so far as the administrative county of Middlesex is concerned, the law upon this subject is now contained in the Music and Dancing Licenses (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), which came into operation on the 1st January, 1895. By that Act (which consolidates the previous Acts), the new superscription to be affixed over the doors of the licensed premises is "Licensed in pursuance of Act of Parliament for" (*dancing*, or whatever else the licence is for). In places more than twenty miles from Westminster, the regulation of music and dancing depends upon whether the local authority has adopted the Public Health Acts Amendment Act, 1890. In some places the amusements are regulated by local Acts.

(*d*) *R.* v. *Downs* (1790), 3 T. R. 560.

(*e*) Prior to the "Licensing Acts" above mentioned, the law as to the sale of "beer, cider, and

"general annual licensing meeting" held within the first fourteen days of February in each year in pursuance of the above statutes. A licence is only granted for one year. It has now been made clear, by parliament and the courts, that the justices have an absolute discretion as to the granting or refusing of all new licences, a discretion which is to be exercised, not capriciously, but on reasonable grounds for the good of the neighbourhood. The same rule applies to the *renewal* of licences, with certain exceptions, which have been reduced in consequence of the Licensing Act, 1902. By section 10 (2) and (3) of that Act, justices have full discretion to refuse any off-licence or renewal of an off-licence, except to persons who held off-licences for wine, spirits, liqueurs, sweets, or cider, on June 25th, 1902, to whom the justices can only refuse renewal on one of the four grounds mentioned in the Wine and Beerhouse Act, 1869 (s. 8), or of the three grounds mentioned in the Licensing Act, 1902 (s. 10 (4)). The four grounds are briefly: unsatisfactory character of the applicant, bad character of the house, previous forfeiture of licence by applicant for misconduct, and legal disqualification. The three new grounds are surreptitious sales, concealment or misrepresentation of goods sold, and the wider and more general objection that the licensee "has, in the "opinion of the licensing justices, been guilty of misconduct "in the management of his business under such licence." As regards licences for the sale of beer, by retail, for consumption *on the premises*, the licensing justices always had an absolute discretion, with the exception of the "*ante*-1869-beerhouse licences." So that, except for these, and the off-licences above mentioned, the grant or renewal of the licence, whether for consumption on or off the premises, is,

"perry," for consumption *off the premises*, was regulated by a group of statutes commonly known as the "Beer Acts." Under these no licence from the justices was required, but an *excise* licence only.

as we have seen, in all cases now to be considered as lying in the absolute discretion of the justices (*f*).

The objection to renewal may be taken by the justices themselves, and may be simply that the number of licensed premises is in excess of the demands of the neighbourhood (*g*).

These licences to sell exciseable liquors are granted by the magistrates subject to certain conditions, which have for their object the preservation of sobriety and decorum on the licensed premises. And, still further to promote that object, and with a view also to discouraging unnecessary indulgence in drink generally, it was enacted, by the Sale of Spirits Acts, 1750 and 1862, commonly known as the "Tippling Acts" (*h*), that no action should be maintained for a debt for spirituous liquors consumed on the licensed premises, unless *bonâ fide* contracted at one time to the amount of twenty shillings and upwards; and, by the County Courts Act, 1888, s. 182, that no action should be maintained for any debt for ale, porter, beer, cider, or perry consumed on the premises where the same was sold or supplied. And with the same objects in view, and by means of the Licensing Acts, the law has subjected public houses and all other places, now including clubs, in which any species of intoxicating liquors are sold by retail, whether intended to be consumed *on or off the premises*, to a more or less efficient system of inspection and restraint, of which we will now proceed to give some account.

The Licensing Acts, 1872, 1874, and 1902 (*i*), enact, in the first place, that if any person shall sell or expose for sale any intoxicating liquor without having a licence to sell,

(*f*) *Sharp* v. *Wakefield*, [1891] A. C. 173.

(*g*) *R.* v. *Howard*, [1902] 2 K. B. 363; *S. C.*, *R.* v. *Farnham JJ.*, 66 J. P. 579.

(*h*) 24 Geo. 2, c. 40; 25 & 26 Vict. c. 38.

(*i*) 35 & 36 Vict. c. 94; 37 & 38 Vict. c. 49; 2 Edw. 7, c. 28.

or at a place where, by his licence, he is not authorized to sell the same, he shall be liable, in the case of a first offence, to a penalty not exceeding 50*l*., or to imprisonment with or without hard labour for not more than one month; and in the case of a second or other subsequent offence, the penalty may be as much as 100*l*., and the imprisonment rises to three months, and to six months. On a third conviction, the offender may be disqualified from holding a licence (*k*). Also, if any licensed person permits drunkenness, or any violent quarrelsome or riotous conduct, on his premises, or sells liquor to a drunken person (*l*), or spirits to be drunk on the premises to a child apparently under the age of sixteen, or permits his premises to be used as a brothel, or harbours on his premises a constable on duty, or bribes or attempts to bribe any constable, or suffers gaming or unlawful games to be carried on on his premises, then for every such offence, and for some other cognate specified offences against public order, he is liable to a pecuniary penalty; and thereupon, in virtue of the Licensing Act, 1902, the conviction is to be entered by the clerk of the licensing justices in a register of licences kept by him. The entry of two such convictions will cause a forfeiture of the offender's licence; and a third conviction will disqualify him from afterwards obtaining a fresh licence for the term of five years, and will, in some cases, prevent even a grant being made to any one, in

(*k*) Act of 1872, ss. 3, 4. In addition to other penalties, the offender, on his second conviction, forfeits any licence he may hold.

(*l*) *Commissioners of Police* v. *Cartman*, [1896] 1 Q. B. 655. If it is proved that any person has been drunk on licensed premises, it lies on the licensed person to prove "that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises" (Act of 1902, s. 4). Under the Licensing Act, 1902, any person found drunk in a public place may be arrested, and any person found drunk there while in charge of a child, apparently under seven years old, may be arrested, and will, if the child is under that age, be liable on summary conviction to a fine of forty shillings, or to a month's imprisonment, with or without hard labour.

respect of the same premises, for the space of two years from the date of such third conviction (*m*). Licence holders are also prohibited from supplying liquor to persons declared to be habitual drunkards, and are made liable if they do so to a fine of 10*l.* for the first offence, and of 20*l.* for any subsequent offence (*n*).

Secondly, the Acts contain stringent regulations, with regard to the *times* during which the sale of intoxicating liquors may be carried on, it being provided, that all premises wherein such liquors are sold by retail, if situate within the metropolitan district (that is to say, in the city of London or the liberties thereof, or any place subject to the jurisdiction of the late Metropolitan Board of Works, or within the four-mile radius from Charing Cross), must be closed on week days (except Saturdays) from half an hour after midnight until five o'clock on the same morning; and if situated beyond such metropolitan district, but in the metropolitan *police* district, or in a town or place with a population of not less than one thousand (determined to be a "populous place" by the county licensing committee), must be closed between the hours of eleven at night and six on the following morning; and if situated elsewhere, then between the hours of ten at night and six on the following morning (*o*). On Saturday nights the hours of closing in the metropolitan district are from midnight until one o'clock in the afternoon of the following Sunday, and on Sunday nights (including Christmas Day and Good Friday) from eleven o'clock till five on the following morning. In places beyond that district, being in the metropolitan *police* district, or in a "populous place," the hours of closing on Saturday night are from eleven o'clock until 12.30 p.m., sometimes 1 p.m., on the following Sunday; and on Sunday night from ten o'clock

(*m*) See Act of 1872, ss. 7, 13, 15—17, 30, 31; Act of 1902, s. 9.

(*n*) Act of 1902, s. 6.

(*o*) Act of 1874, ss. 3, 6.

until six on the following morning. In other places, the hours of closing on Saturday night are from ten o'clock until 12.30 p.m., sometimes 1 p.m., on the following Sunday, and on Sunday night from ten o'clock until six o'clock on the following morning. All premises, wherever situate, must be closed on Sunday afternoon, from half-past two till six o'clock (*p*). And any person who sells or exposes for sale, or keeps open any premises for the sale of, intoxicating liquors, during the times that such premises ought to be closed, or who allows during such times intoxicating liquors to be consumed thereon, is rendered liable to a penalty of 10*l.* for the first and of 20*l.* for any subsequent offence, unless such liquors are supplied to *bonâ fide* travellers, or persons lodging in his house, or (in the case of a railway station) persons arriving at or departing from such station by rail (*q*).

The Licensing Acts supply also additional safeguards, with regard to the manner in which licences are granted. For this purpose, the justices in quarter sessions for every county are directed annually to appoint among themselves a *licensing committee*, consisting of not less than three nor more than twelve members (*r*), by whom the grant of all new licences, made at the general annual licensing meeting, must be confirmed; and analogous provisions are made with regard to borough justices, except that, where

(*p*) By the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), the premises must be closed the whole of Sunday. But Christmas Day and Good Friday are not Sunday under this Act. See *Forsdike* v. *Colquhoun* (1883), 11 Q. B. D. 71.

(*q*) Act of 1874, ss. 9, 10; *Taylor* v. *Humphreys* (1861), 10 C. B. (N.S.) 429; *Coulbert* v. *Troke* (1875), 1 Q. B. D. 1.

(*r*) The local authority of any licensing district may, on proper cause shown, exempt any licensed person in the immediate neighbourhood of a market, or place where some lawful trade or calling is carried on, from the closing provisions of the Act, save only between the hours of one and two o'clock in the morning (Act of 1872, s. 26); and a licensed person may also obtain, from the local authority, an exemption in respect of *special occasions* to be specified in his licence (*ibid.*, s. 29).

there are less than ten acting justices in the borough, the licensing committee is to be a "joint committee," that is to say, is to consist of three of the borough magistrates, and three of the magistrates for the county in which the borough is situate (*s*).

The rateable value of a public house is arrived at by estimating its value to a hypothetical tenant, and for this purpose the existence of the licence must be taken into account, but not the tie (if it is a "tied" house); and evidence may be taken of the trade carried on (*t*).

In addition to public houses properly so-called, the legislature by the Refreshment Houses Act, 1860 (*u*), has sanctioned a distinct class of houses for the refreshment of the public, called "refreshment houses." Under that Act (as amended), in order to keep a refreshment house, it is necessary to obtain, from the officers of Inland Revenue, an excise licence bearing an excise duty (*v*); and any person licensed to keep a refreshment house, who pursues therein the business of a confectioner, or who keeps open such house for the purpose of selling animal or other victuals wherewith wine or other fermented liquors are usually drunk for consumption on the premises, is entitled (subject to the terms of the Act) to take out an excise licence to sell wine by retail in such house, to be consumed on the premises (*x*). But the excise licence in the case of refreshment houses is now only granted on a certificate from the justices, as in the case of other licensed houses (*y*). According to the requirements of the Licensing Act, 1872, no intoxicating liquor may be consumed upon premises licensed as a refreshment house, but not for the sale of any intoxicating liquor, during the hours during which licensed

(*s*) Act of 1872, ss. 37, 38, 84.

(*t*) *Cartwright* v. *Sculcoates Union*, [1900] A. C. 150.

(*u*) 23 & 24 Vict. c. 27; amended by the Revenue (No. 2) Act, 1861, ss. 8—11.

(*v*) Refreshment Houses Act, 1860, ss. 1, 2, Sched. No. 1.

(*x*) Act of 1860, s. 7.

(*y*) Wine and Beerhouse Act, 1869.

victuallers must keep their houses closed ; and the same Act has provided (*z*), as regards refreshment houses not licensed for the sale of intoxicating liquors, that the hours during which they may be kept open shall be the same as in the case of licensed victualling and other public houses.

The Refreshment Houses Act also further provided, that any person, keeping a shop for the sale of goods and commodities, should be entitled to take out another sort of excise licence, commonly called a "grocer's licence," to sell wine by retail, in reputed quart or pint bottles only, and not to be consumed in the shop (*a*) ; but this excise licence also, as we have seen, is now only granted on a certificate from the justices (*b*).

2. *Clubs.*—Clubs have been brought within the scope of the Licensing Acts for certain limited purposes by Part III. (ss. 24—32) of the Licensing Act, 1902. By that Act (s. 24) every club in which any intoxicating liquor is supplied to members or their guests must be registered by the secretary. But such registration does not constitute the club licensed premises, or render legal any sale of intoxicating liquor which would otherwise have been illegal. In an unregistered club intoxicating liquor may not be sold, under heavy penalties. If a club is misconducted, it may (on grounds mentioned in section 28 of the Act) be struck off the register by a court of summary jurisdiction, on complaint in writing made by any person. And if a justice of the peace is satisfied by information on oath that there is reasonable ground for thinking that a registered club should be struck off the register, he may grant a search warrant to a constable to enter the club. Otherwise there is no police supervision of registered clubs ; nor does the Act in any way interfere with the hours of closing clubs, or impose upon them any of the other incidents of licensed premises.

(*z*) Sect. 27.

(*a*) Act of 1860, s. 3.

(*b*) Wine and Beerhouse Act, 1869.

3. *Theatres.*—The Theatres Act, 1843 (6 & 7 Vict. c. 68), is the principal Act on this subject. It first repeals previous enactments as to theatres, and then proceeds to prohibit all persons from having or keeping (*c*) any house or other place of public resort in Great Britain, for the public performance of stage plays, including all dramatic performances which involve dialogue (*d*), unless they shall have either the authority of letters-patent from the Crown, or a licence from the lord chamberlain of the household, or a licence granted by the council of a county or county borough (*e*). Covent Garden Theatre is authorised by letters-patent. The jurisdiction of the lord chamberlain extends to all other theatres within the parliamentary boundaries of London and Westminster, and within the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark, and also within all places where the King shall for the time being reside ; the jurisdiction of the justices (now the county and county borough councils) extends to all places beyond these limits (*f*). But no licence is to be granted, by either of these authorities, except to the actual and responsible manager of the proposed theatre for the time being ; and he is to give security for the due observance of such regulations as the authorities may impose. And no licence from the justices is in force in Oxford or Cambridge, or within fourteen miles of the same, without the consent of the chancellor or vice-chancellor of these universities (*g*). Penalties are imposed on any person who, for hire, acts, or causes to be acted, any part of a stage play, in a place (not being a patent theatre) which is

(*c*) *Shelley* v. *Bethell* (1883), 12 Q. B. D. 11.

(*d*) *Wigan* v. *Strange* (1865), L. R. 1 C. P. 175 ; *Shelley* v. *Bethell* (*supra*).

(*e*) Theatres Act, 1843, s. 2.

(*f*) *Ibid.* s. 3 ; Local Government Act, 1888, s. 7. A contract to perform in an unlicensed theatre is not enforceable (*Gallini* v. *Laborie* (1793), 5 T. R. 242).

(*g*) Sect. 10. See, for the privileges of the universities, *R.* v *Archdall* (1838), 8 A. & E. 281.

not duly licensed (*h*). Moreover, county councils are empowered to make suitable rules for ensuring order and decency in the theatres licensed by them, and for regulating the times when they are to be open; but these rules may be rescinded or altered by a secretary of state. In the case of a riot, or for breach of any regulation in a theatre, the justices may order the same, if licensed by them, to be closed; and the lord chamberlain, as to theatres licensed by him, and also as to patent theatres, may, in the case of a riot or on any public occasion whatever, order the same to be closed (*i*).

The Theatres Act, 1843, has also provided, that one copy of every new stage play and of every new act, scene, part, prologue, or epilogue of a play, intended to be acted for hire at any theatre in Great Britain, shall be sent seven days previously to the lord chamberlain for his allowance; and that, without such allowance, it shall not be lawful to act the same (*k*). The lord chamberlain may also forbid (under penalties in case of disobedience) the representation or performance of any stage play, or part thereof, in any theatre whatever, whenever such a course shall appear to him advisable, whether for the preservation of good manners or decorum, or with a view to preserve the public peace (*l*).

It will be remembered, that, as stated in an earlier part of this volume, all the business of the justices in respect of the licensing of houses or other places for the public execution of stage plays, has now been transferred, by the Local Government Act, 1888, to the county council for the county or county borough; but the county council may delegate this business to justices in petty sessions (*m*).

(*h*) Act of 1843, s. 11.
(*i*) Sect. 8.
(*k*) Sect. 12.
(*l*) Sect. 14.
(*m*) 51 & 52 Vict. c. 41, ss. 7, 28.

CHAPTER XVI.

OF THE LAWS RELATING TO THE PRESS.

THE importance of the press in modern life is evidenced by the variety of ways in which it affects the laws of England. We have already dealt, at some length, with the subject of copyright, *i.e.*, with the right enjoyed by an author, or his assignees, to prevent the multiplication by the press of unauthorized copies of his works (*a*). In a later chapter of this volume, we shall deal with the civil remedies against persons who employ the press to spread defamatory statements about others (*b*). In the last Book of these Commentaries we shall deal with crimes relating to the press (*c*). Here we propose to deal only with those general regulative provisions which control the operations of this great organ of social life, especially in the matter of periodical publications. For the press is a mighty engine for good or for evil, according as it is used; and therefore, from its very nature, it requires to be kept under due restraint. The censorship of the press in this country became an important function with the introduction of printing at the end of the fifteenth century, and it was exercised originally in the Court of Star Chamber. When that court was abolished, in 1641, the like jurisdiction was repeatedly exercised by the Long Parliament, and notably in the years 1643, 1647, 1649, and 1652 (*d*). After the Restoration, in 1660, the censorship was regulated and continued under the 14 Car. II.

(*a*) *Ante*, vol. ii. pp. 33—35.
(*b*) *Post*, bk. v. ch. iii.
(*c*) *Post*, bk. vi. ch. iv.
(*d*) Scobell, i. 44, 134; ii. 88, 230.

(1662), c. 33 ; which Act expired in the year 1679, but was revived by 1 Jac. II. (1685), c. 17, and afterwards continued by 4 W. & M. (1692), c. 24, till the year 1694, since which last-mentioned year this censorship has ceased. And although no censorship has since that year been, or is now, exercised in this country over the press, still the press is duly held in check, by certain restrictive provisions, having for their general object to ascertain in every instance the printer and publisher of every book, newspaper, etc. ; so as to make these persons amenable to the law, whenever the purposes of civil redress or of criminal justice require (*e*).

The restrictive provisions referred to are principally those contained in the second schedule to the Newspapers, Printers, and Reading Rooms Repeal Act, 1869. This Act repealed a great number of prior Acts, and parts of prior Acts, which were deemed to be hostile to the legitimate freedom of printing, and re-enacted those portions of such prior Acts which were deemed to impose only reasonable restrictions on the liberty of printing and of the press. Later Acts dealing with the liberty of the press are the Newspaper Libel and Registration Act, 1881, and the Law of Libel Amendment Act, 1888. The restrictions imposed by these three Acts are as follows. Every person who prints any paper for hire or gain must carefully preserve and keep at least one copy of such paper : and must write or print thereon, in fair and legible characters, the name and place of abode of his employer. If he neglect to do so, or fail to produce the copy to any justice who, within the space of six calendar months, shall demand a sight thereof, he is to incur a penalty, for every such neglect or omission, of 20*l*. And, further, every person who prints any paper or book whatsoever, for publication or dispersion, must print upon the front thereof (if the same be printed upon one side only),

R. v. *Hicklin* (1868), L. R. 3 Q. B. 360.

or upon the first or last leaf of every paper or book consisting of more than one leaf, in legible characters, his name and usual place of abode or business ; and for neglecting to do so, he and every person publishing or dispersing, or assisting in publishing or dispersing, any paper or book printed without such particulars, forfeits, for every copy so printed, a sum not exceeding 5*l*. But in the case of books or papers printed at the University Press of Oxford, or at the Pitt Press of the University of Cambridge, the printer, instead of printing his name thereon, is merely to print the following words, "Printed at the University Press, Oxford," or "Printed at the Pitt Press, Cambridge," as the case may be. Also, the above provision with respect to the printer's name and place of abode does not extend to any papers printed by the authority, and for the use, of either House of Parliament (*f*) ; or to any bank note or security for payment of money, any bill of lading, policy of insurance, letter of attorney, deed or agreement, transfer or assignment of public stock or securities, or dividend warrant thereon, or to any receipt for money or goods, or to any proceedings in any court of law or equity. And as regards the penalties imposed by the Newspapers, Printers and Reading Rooms Repeal Act, 1869, no person is to be sued but within three months after the offence ; and the action is to be brought in the name of the Attorney-General or Solicitor-General.

The Newspaper Libel and Registration Act, 1881, provides (*g*) for a register of the proprietors of newspapers, to be kept by the registrar of joint stock companies ; and for the registration in such register of one or more responsible "representative proprietors," where the proprietary is numerous (*h*). It also imposes (*i*) on all

(*f*) The Newspapers, Printers, and Reading Rooms Repeal Act, 1869, Sched. II., re-enacting the Unlawful Societies Act, 1799, s. 28 ; and 51 Geo. 3 (1811), c. 65, s. 3.

(*g*) Sect. 8.

(*h*) Sect. 7.

(*i*) Sect. 9.

printers and publishers of newspapers, the duty of making returns, to the registrar, of various particulars, including the title of the newspaper, and the names and occupations and places of business and of residence of all the proprietors. For neglect to make such returns, the printer or publisher offending is made liable to a penalty not exceeding 25*l.*; and he may be summarily ordered to make the necessary returns (*k*). The penalty is recoverable before any court of summary jurisdiction, in accordance with the Summary Jurisdiction Acts (*l*). But by way of affording protection to honest printers and publishers, who are reasonably careful of what they permit to appear in the newspapers printed or published by them, it was provided by the Newspaper Libel and Registration Act, 1881, that newspaper reports of certain meetings should be privileged (*m*); and that no prosecution for a libel contained in a newspaper should be commenced without the fiat of the director of criminal prosecutions (*n*). Both these provisions have now been repealed by the Law of Libel Amendment Act, 1888, which has placed the law relating to these matters on a more satisfactory footing. This Act protects (*o*):—(a) A report published in a newspaper of a public meeting, *i.e.*, for the purposes of the Act, "a meeting *bonâ fide* and lawfully held for a lawful "purpose, and for the furtherance or discussion of any "matter of public concern, whether the admission thereto "be general or restricted"; (b) A report, published in any newspaper, of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters-patent, Act of Parliament, warrant under the Royal Sign Manual, or

(*k*) Sect. 10.
(*l*) Sect. 16.
(*m*) Sect. 2.
(*n*) Sect. 3.
(*o*) Sect. 4.

other lawful warrant or authority, or of Select Committees of either House of Parliament. In each of the above cases (a) and (b), however, in order that the report should be privileged, the following conditions must be fulfilled :— (1) The report must be fair and accurate ; (2) The matter reported must not be blasphemous or indecent ; (3) The matter reported must be of public concern, or the publication thereof must be for the public benefit. Further, in the case of a report coming under head (b) above, the public, or a newspaper reporter, must have been admitted, or given an opportunity of admission, to the meeting. The privilege may also be rebutted by proof (1) that the report was published maliciously ; or (2) that the defendant has, after request, refused or neglected to insert in his newspaper a reasonable letter or statement by way of contradiction or explanation of such report. The Law of Libel Amendment Act, 1888, also protects (*p*) a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority, provided such report is published contemporaneously with such proceedings. The better opinion appears to be, that this last provision is merely declaratory of the common law, which has always protected a fair and accurate report of judicial proceedings by whomsoever published. The report will, however, not be protected if it can be shown that it was published maliciously ; and there is no privilege for the publication of blasphemous or indecent matter. It should be noticed that, by the common law, a fair and accurate report of parliamentary proceedings is on the same footing as a fair and accurate report of judicial proceedings, *i.e.*, it is protected unless it can be shown that it was published maliciously (*q*) ; but by the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), the publication of any reports, papers, votes, or pro-

(*p*) Sect. 3.

(*q*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73.

ceedings of either House of Parliament, by the order or under the authority of that House, is now *absolutely* protected, and so is the republication of such matter in full.

The Law of Libel Amendment Act, 1888, provides (*r*) that no prosecution for any newspaper libel shall be commenced, without the order of a judge at chambers first had and obtained for the purpose, on due notice to the proposed defendant. The Act also contains provisions (*s*) for the consolidation of actions in respect of the same, or substantially the same, libel brought by the same person against two or more defendants. Further, it enables (*t*) a defendant, in an action for a libel contained in any newspaper, to give in evidence in mitigation of damages, that the plaintiff has already recovered or brought actions for damages, or has received or agreed to receive compensation in respect of a libel or libels, to the same purport or effect as the libel for which such action has been brought.

(*r*) Sect. 8.
(*s*) Sect. 5.
(*t*) Sect. 6.

CHAPTER XVII.

OF THE LAWS RELATING TO PROFESSIONS.

In most employments the rewards resulting from success, and the discredit and failure consequent upon incompetency, form a natural and sufficient security to the public, that they will not be undertaken without the necessary qualifications. But there are professions productive of evils so serious, when improperly exercised, and so liable at the same time to be exercised by unfit persons, as to make it proper to subject them to the restraints of legal regulation. Those callings which our law deems to be of that character, (or those at least which have especially attracted the notice of our legislature as such,) are the professions of medicine and law.

I. *As to the Medical Profession.*—The necessity of placing under legal supervision the practitioners both of physic and of surgery was early acknowledged; for so long ago as 1511, it was enacted, that no person should, unless he were a graduate in medicine or surgery of one of the two universities, practise as a physician or surgeon without examination and licence (*a*). In furtherance of this enactment, by royal charter dated the 23rd September, 1518, and confirmed by statute in 1522 and 1540, a college of physicians in London was established (*b*); and it was ordained, that this college should choose four physicians yearly to supervise all others within London and seven

(*a*) 3 Hen. 8, c. 11.

(*b*) The charter of Henry VIII. was subsequently *enlarged* (being at the same time *confirmed*) by statute in 1553, and by certain other charters of later dates, viz., the 8th of October, 1617, and the 26th of March, 1663.

miles thereof, "as also their medicines and receipts," so that such as offended should be punished with fines, imprisonment, or other means. And no person was to be at liberty to practice physic or surgery, within that area, except by the licence of the college (*c*).

The case of the surgeons is somewhat different. A *Company of Barbers* had been incorporated as early as 1462, by letters patent of Edw. IV. dated 24th February in that year. By the Act of 1511, as we have seen, persons were allowed to practise as *surgeons* after having been "examined and approved"; and by the year 1540, many "surgeons" were so practising in London. In that year these latter were incorporated by amalgamation with the barbers, under the style of the "mystery and commonalty of barbers and surgeons of London" (32 Hen. VIII. c. 42); and afterwards, by a charter in their favour bearing date the 15th of August, 1629, all persons (except such physicians as therein mentioned) were prohibited from exercising, within London and Westminster (or within seven miles from London), the profession of *surgeon* for profit, unless first duly examined and admitted by the "united company of barbers and surgeons of London." Ultimately, by a statute passed in the year 1745 (*d*), and two charters dated respectively the 22nd of March, 1800, and the 14th of September, 1843, "The Royal College of Surgeons of England" was established in its present constitution. By the last-mentioned charter, a new class of members, called *fellows*, was created, from and by whom the council of the college was to be in future elected; and all future examiners were to be chosen by, and to hold their office at the pleasure of, the council. But no by-law or ordinance thereafter to be made by the council was to be of any force, until the royal approbation thereof had been signified to the college, under the hand

(*c*) *R.* v. *Askew* (1768), 4 Burr. 2186; *Rose* v. *Physicians' College* (1703), 5 Bro. P. C. 553; *Collins* v. *Carnegie* (1834), 1 A. & E. 695.

(*d*) 18 Geo. 2, c. 15.

of a principal secretary of state, or until it had been otherwise approved, in such manner as parliament should direct.

The profession of *apothecaries* first obtained a charter from James the First in 1618; which charter was afterwards confirmed and enlarged by the Apothecaries Act, 1815. This Act, however, did not abolish the privileges of the Society of Apothecaries (*e*), and was subsequently amended, in some material respects, by the Apothecaries Act Amendment Act, 1874 (*f*). The general effect of the charter and Acts is, that no person may practise as an apothecary, or act as an assistant to an apothecary, in any part of England or Wales, unless he has, after being duly examined, received a certificate, of his being duly qualified in that behalf, from the "Society of the Art and Mystery of Apothecaries of the City of London"; and it is provided, that such a certificate shall not be granted to any person below the age of twenty-one (*g*), nor to any but such as have served an apprenticeship of five years to some apothecary, and who can produce testimonials of sufficient medical education and good moral conduct. Any person practising without a certificate is not only disabled from recovering his charges (*h*), but is also made liable to a penalty of 20*l*. for every offence (*i*). Power is also given to the society, to strike off from the list of their licentiates any person who shall be convicted of any crime, or who, after due inquiry by the General Council of Medical Education, (presently to be

(*e*) *The Apothecaries' Company* v. *Warburton* (1819), 3 B. & Ald. 40.

(*f*) 37 & 38 Vict. c. 34.

(*g*) Sect. 14. As to the certificate, see *Young* v. *Geiger* (1848), 6 C. B. 541.

(*h*) Act of 1815, s. 21; *Leman* v. *Fletcher* (1873), L. R. 8 Q. B. 319; *Brown* v. *Robinson* (1824), 1 Car. & P. 264; *The Apothecaries' Company* v. *Greenwood* (1831), 2 B. & Ad. 709. And see the remarks of COTTON, L.J., in *Davies* v. *Makuna* (1885), 29 Ch. D 596; also *Pharmaceutical Society* v. *London, etc. Supply Association* (1880), 5 App. Ca. 857; and *Howarth* v. *Brearley* (1887), 19 Q. B. D. 303.

(*i*) Act of 1815, s. 20.

mentioned,) shall be judged to have been guilty of infamous conduct in any professional respect (*k*); and any licentiate refusing to compound or sell, or negligently compounding or selling, any medicines as directed by any prescription or order signed with the initials of any physician lawfully licensed, incurs certain penalties (*l*). Moreover, the society, or any two or more qualified persons appointed by it, may at all reasonable times in the daytime enter any apothecary's shop, and examine whether the medicines and drugs there kept be wholesome, and may destroy such as shall be found otherwise, and report to the society the names of such persons as shall have the same in their possession; who are thereupon made liable to a fine of 5*l*. for the first, 10*l*. for the second, and 20*l*. for every subsequent offence (*m*). The Apothecaries Act, 1815, did not extend (*n*) to the business of a *chemist and druggist*, or to the buying, preparing, compounding, dispensing, and vending of drugs, medicines, and medicinable compounds, wholesale and retail. But, by the Pharmacy Acts, 1852, 1868, and 1869, no person may now assume the title of a chemist or druggist, or sell by retail (or compound) the *poisons* specified in the Acts, unless he has been examined by, and has obtained a certificate from, and been placed on the register of the Pharmaceutical Society of Great Britain (*o*). These Acts contain also provisions with regard to the sale of poisons *generally*, requiring them to be distinctly labelled as such, and with the name and address of the seller (*p*); and the sale of *arsenic* in particular (unless when supplied wholesale or on a medical

(*k*) Act of 1874, s. 4.

(*l*) Act of 1815, s. 5.

(*m*) Sect. 3.

(*n*) Sect. 28.

(*o*) As to the meaning of the word "sell," see *Pharmaceutical Society* v. *White*, [1901] 1 K. B. 601. See also the Pharmacy Acts Amendment Act, 1898, under which registered apprentices and students of pharmacy may become "*student-associates*" of the society, and registered chemists and druggists may become members thereof.

(*p*) Act of 1868, s. 17; and see *Berry* v. *Henderson* (1870), L. R. 5 Q. B. 296.

prescription) is subject, under the Arsenic Act, 1851, to special rules, which require certain particulars to be signed by the purchaser, stating (among other things) the purpose for which the arsenic is required. And where the purchaser is unknown to the vendor, the sale must also be made in the presence of some common acquaintance, who must also sign the particulars; and the arsenic must, in general, be coloured with a proportionate *admixture of indigo or soot.*

Such were the different charters and statutes by which the medical profession in England, in its various branches, was principally governed till the year 1858, when the Medical Act, 1858, was passed. This Act has since been amended by a variety of Acts passed at various times between the years 1859 and 1886; and in particular by the Medical Act, 1886.

By these Acts a "General Council of Medical Educa-"tion and Registration of the United Kingdom," was established as a body corporate, with a perpetual succession and a common seal, and with capacity to hold lands for the purposes of the Acts (*q*). It consists of twenty members chosen respectively by each of certain colleges, universities, and bodies, including the Royal College of Physicians of London, the Royal College of Surgeons of England, and the Apothecaries' Society of London (*r*), together with five persons nominated by the Crown (*s*),

(*q*) Medical Council Act, 1862, s. 1.

(*r*) The other colleges and bodies are the Universities of Oxford, Cambridge, London, Durham, Victoria, Edinburgh, Glasgow, Aberdeen, St. Andrews, and Dublin; the Royal University of Ireland; the Royal College of Physicians of Edinburgh; the Royal College of Surgeons of Edinburgh; the Faculty of Physicians and Surgeons of Glasgow; the King's and Queen's College of Physicians in Ireland; the Royal College of Surgeons in Ireland; and the Apothecaries' Hall of Ireland (Act of 1886, s. 7).

(*s*) Of these five nominated persons, three are for England, one for Scotland, and one for Ireland. (*Ibid.*)

and five persons elected from time to time by the registered medical practitioners of the United Kingdom (*t*). To this General Council is entrusted the duty of carrying out a system of registration of all medical practitioners, calculated to insure their addresses and qualifications being generally known; the registers being printed, published, and sold to the public, under the style of "The Medical Register."

Upon these registers is entitled to be placed (on payment of a fixed fee) the name of any person possessed of any one or more of the qualifications specified in the Schedule A. to the Medical Act, 1858. These qualifications extend to members and licentiates of the medical colleges, and members or graduates of the universities and bodies above specified or referred to; also, of any one who thereafter, and prior to the Medical Act, 1886, and whether a male or female (*u*), became possessed of one or other of such qualifications, or who since the last-mentioned Act, has acquired the statutory qualification. For, by the Medical Act, 1886, it has now been provided:—That no person shall hereafter be put on the register, in respect of any of the aforesaid qualifications, unless he has passed an examination (called the "qualifying examination") by the Act appointed (*x*), being an examination in medicine, surgery, and midwifery, held by any of the examining bodies in the Act appointed, before inspectors (*y*), and with or without the aid of assistant examiners (*a*). A separate list in the register is appropriated to colonial and foreign practitioners; and, in the case of those who derive their medical qualifications from countries where British diplomas are recognised, reciprocal advantages are (subject to certain restrictions) accorded to them in the United

(*t*) Of these five elected persons, three are to be elected by the medical practitioners resident in England, one by those resident in Scotland, and one by those resident in Ireland. (*Ibid.*)

(*u*) Act of 1876, s. 1.
(*x*) Act of 1886, s. 2.
(*y*) *Ibid.* s. 3.
(*a*) *Ibid.* s. 5.

Kingdom (*b*). The General Medical Council is subject to the supervision of the Privy Council, as regards its execution of the various duties assigned to it by the Medical Acts (*c*).

Such being the different classes of persons entitled to be registered, the Acts provide, that none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners (*d*), nor to recover any charge in any court of law for any medical or surgical advice or attendance, or for the performance of any operation, or for any medicine which they have both prescribed and supplied (*e*), nor to hold any of the government or other medical appointments specified in the Act (*f*), nor to sign any certificate required by Act of Parliament to be signed by a medical practitioner (*g*). Any person who wilfully and falsely pretends to be, or takes or uses the name or title of, a physician, doctor, surgeon, general practitioner, or apothecary, or any name, title, addition, or description, implying that he is registered or recognized by law in such assumed capacity, may be summarily convicted and fined, the fine (which is not to exceed twenty pounds) being paid to the treasurer of the Council (*h*). And every person duly registered is entitled, according to his qualification, to practise medicine or surgery, or both (as the case may be), in the United Kingdom (*i*), and, subject to any local law, in any of his Majesty's

(*b*) *Ibid.* ss. 11—13, 17.

(*c*) *Ibid.* s. 19.

(*d*) Medical Act, 1858, s. 34; as to *veterinary* surgeons, see the Veterinary Surgeons Act, 1881.

(*e*) Medical Act, 1858, s. 32; and see *De la Rosa* v. *Prieto* (1864), 16 C. B. (N.S.) 578; *Leman* v. *Houseley* (1874), L. R. 10 Q. B. 66; *Wright* v. *Greenroyd* (1861), 1 B. & S. 758; and *Turner* v. *Reynall* (1863), 14 C. B. (N.S.) 328.

(*f*) Act of 1858, s. 36.

(*g*) Medical Act, 1858, s. 37; and see also 1 Edw. 7, c. 22, ss. 122—124 (Factory and Workshop Act, 1901).

(*h*) Act of 1858, ss. 40, 42, 43; *Ellis* v. *Kelly* (1860), 6 H. & N. 222; *Hunter* v. *Clare*, [1899] 1 Q. B. 635.

(*i*) *Davies* v. *Makuna* (1885), 29 Ch. D. 596.

dominions (*k*) ; and he is also entitled to recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the costs of any medicines or other medical or surgical appliances by him supplied to his patients (*l*), subject to this qualifying proviso with regard to *physicians*, that if a physician is a fellow of any college of physicians, the fellows of which are disentitled by by-law of the college to sue for their fees, then such by-law may be pleaded in bar to any action commenced for the recovery thereof. And in addition to the power of recovering their charges thus expressly conferred on registered medical practitioners, they are also exempted, if they so desire, from serving on juries or inquests, or in the militia, or in any municipal or parochial office (*m*).

Besides its functions with reference to keeping the register of qualified medical practitioners, the Medical Council is also invested with the right to lay a representation before the Privy Council, if it finds that any of the bodies entitled by the Acts to hold examinations and to grant medical diplomas, attempt to impose upon any candidate for examination any obligation to adopt, or to refrain from adopting, the practice of any particular theory of medicine or surgery (*n*) ; and the Medical Council may require information from any such body, as to the course of study and examination which it requires from candidates, and is to represent the case to the Privy Council, if such course of study seems not such as to secure the possession of the requisite knowledge and skill. Thereupon, the Privy Council may, either for a time or altogether, deprive such body, so reported, of the power of granting qualifications (*o*). The president of the Medical Council, or any other person the Council may appoint, is also

(*k*) Medical Act, 1886, s. 6.

(*l*) *Turner* v. *Reynall* (1863), 14 C. B. (N.S.) 328.

(*m*) Medical Act, 1858, s. 35; Juries Act, 1870.

(*n*) Medical Act, 1858, s. 23.

(*o*) Sects. 18–21 ; Medical Act, 1886, s. 4.

constituted the "returning officer" for the purpose of electing the five representatives elected by the registered medical practitioners of the United Kingdom (*p*); and such president is to be chosen by the Medical Council from their own number, and is to hold office for a term not exceeding five years (*q*). The Medical Acts also vest in the General Medical Council the copyright of the "British Pharmacopœia"; and provide for the publication of new editions thereof from time to time. And lastly the Acts provide, that his Majesty may grant to the corporation of the Royal College of Physicians of London a new charter under the name of the "Royal College of Physicians of England," the acceptance of which is to operate as a surrender of all previous charters (except that granted by Henry VIII.), and also of all the privileges conferred by or enjoyed under the 14 & 15 Hen. VIII. (1523), c. 5, which shall be inconsistent with such new charter. They contain also provisions with regard to granting fresh charters to the Royal College of Physicians of Edinburgh, under the name of the "Royal College of Physicians of Scotland"; and to "The Royal College of Physicians of Ireland," and to the "Royal College of Surgeons of Scotland."

Before leaving the subject of the medical profession, we must notice the Anatomy Act, 1832 (amended by the Anatomy Act, 1871), by which it is provided, that the executor or other person having lawful possession of the body of a deceased person, and not being intrusted with it for interment only, may permit the body of such person to undergo anatomical examination, unless in his lifetime the deceased shall have expressed, in such manner as in the Act specified, a wish to the contrary, or unless the surviving husband or wife, or other known relation of the deceased, shall object (*r*). Further, the Secretary of

(*p*) Medical Act, 1886, s. 8.
(*q*) *Ibid.* s. 9.
(*r*) *R.* v. *Feist* (1858), 27 L. J. M. C. 164.

State for the Home Department may grant licences to practise anatomy, to any fellow or member of any college of physicians or surgeons, or to any graduate or licentiate in medicine, or to any person lawfully qualified to practise medicine in any part of the United Kingdom, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy, the application for such licence being countersigned by two justices of the peace; and persons so licensed may receive or possess for anatomical examination, or examine anatomically, under such licence, any dead body. But no anatomical examination is to be conducted, save at some place of which the secretary of state has had a week's notice; and the secretary of state may appoint inspectors for all such places, who are to make quarterly returns, as to the dead bodies carried in for examination there.

And lastly, we must notice the Dentists Act, 1878 (*s*), by which it is provided, that, after the 1st August, 1879, no person shall be entitled to call himself a "dentist" unless he is registered under that Act. A person can be so registered after passing an examination, and receiving thereupon a certificate of fitness to practise (*t*); and when registered, he may recover his proper fees and charges (*u*). The Act provides for the Medical Council, by its registrar, keeping a Dentists' Register (*x*); and the persons entitled to be entered in such register include licentiates, in dental surgery or in dentistry, of any of the medical authorities, as well as all persons *bonâ fide* practising dentistry on the 22nd July, 1878, and certain foreign and colonial dentists who may choose to avail themselves of the privileges of the Act.

II. *As to the Legal Profession.*—We here speak of *solicitors*, not of barristers, inasmuch as barristers (as

(*s*) Amended (in some few particulars) by the Medical Act, 1886, s. 26; *R.* v. *Medical Council*, [1897] 2 Q. B. 203.

(*t*) Sect. 18.

(*u*) Sects. 3–5.

(*x*) Sect. 11.

observed in a former volume) (*y*) are, in general, left to the supervision of the Inns of Court, by which they are called to the bar, and are not made the subject of the regulations of any Act of Parliament. Something more will, however, be said of barristers, in a later chapter of this volume (*z*). We shall treat of the law relating to solicitors generally (*a*), a name which, since the coming into operation of the Judicature Acts, 1873—1875, includes also *attorneys-at-law* and *proctors* (*b*). The law relating to solicitors is (for the most part) contained in the following statutes, viz. :—The Solicitors Acts, 1839 to 1899 ; the Frivolous Arrests Act, 1725, section 4 (12 Geo. I. c. 29, made perpetual by 21 Geo. II. c. 3) ; the Judicature Act, 1875, section 14 ; The Legal Practitioners Act, 1877 ; and the County Courts Act, 1888, section 72. Of these statutes, the most important are, the Solicitors Act, 1843 ; the Solicitors Act, 1860 ; the Attorneys and Solicitors Acts, 1870 and 1874 ; the Solicitors Act, 1877 ; the Solicitors Remuneration Act, 1881 ; the Solicitors Act, 1888 ; the Solicitors Act, 1894 ; and the Solicitors Act, 1899. The body to which, subject to the jurisdiction of the Supreme Court, the registration, education, and discipline, of the solicitors' branch of the legal profession are entrusted, is the Incorporated Law Society, or, as it is now to be called, the " Law Society (*c*)."

By the above statutes, and in particular by the Solicitors Act, 1843, it is enacted, that no person shall act as a solicitor, or sue out any writ or process as such, or commence, carry on, solicit, or defend any action or other proceeding, in the name of any other person, in any court of civil or criminal jurisdiction, or in any court of law or

(*y*) *Ante*, vol. i., pp. 6—8.

(*z*) *Post*, pp. 297—301.

(*a*) As to *notaries public*, see Public Notaries Acts, 1801 and 1843, and Solicitors Act, 1877, s. 17 ; *R.* v. *Scriveners' Company* (1842), 3 Q. B. 939.

(*b*) 36 & 37 Vict. (1873), c. 66, s. 87, and 38 & 39 Vict. (1875), c. 77, s. 14.

(*c*) See W. N., June 20, 1903

equity in England or Wales, unless he shall have been admitted, enrolled, and be otherwise duly qualified to act, as a solicitor, either previously to, or else in pursuance of, the Acts (*d*); and any person acting contrary to this provision is guilty of *contempt of court*, and is incapable of recovering his fees, and is liable to a penalty of 50*l*. (*e*), as well as to be indicted for a misdemeanor. But any solicitor, thereunto authorised by the Commissioners or the Solicitor of Inland Revenue, has a right of audience in any county court in England or Ireland where the proceeding relates to Inland Revenue (Finance Act, 1896); and carrying out of mere ministerial work, such as lodging papers at the Probate Registry, is not such as comes within the solicitor's monopoly (*g*).

To entitle a person to be admitted and enrolled as a solicitor, it is, in the first place, required of him in general that, having been previously duly *articled* (*h*) to some practising solicitor (or firm of solicitors) (*i*) in England or Wales, he shall have actually served him or them as clerk for *five* years (*k*). But a service of *four* years will suffice, if the candidate shall have passed certain prescribed examinations at the universities of Oxford, Cambridge, Dublin, Durham, Victoria, or London, or at the Queen's University of Ireland, or at any of the universities in Scotland, or at

(*d*) Act of 1843, s. 2.

(*e*) Solicitors Act, 1860, s. 26; and see *R.* v. *Buchanan* (1846), 8 Q. B. 883; *In re Walter Simmons* (1885), 15 Q. B. D. 348.

(*g*) See *Incorporated Law Society* v. *Waterlow* (1883), 8 App. Ca. 407, and *In re Panton*, [1901] P. 239.

(*h*) The *articles* must be registered with the Law Society as Registrar of Solicitors (Act of 1888, s. 7). If not registered within six months of their date, they may be registered subsequently; but in that case, the service under them dates from the date of registration (sect. 8). *Fresh* articles (under Solicitors Act, 1843, s. 13), where there are any such, must be registered. (Sect. 9.)

(*i*) *In re Holland* (1872), L. R. 7 Q. B. 297.

(*k*) *Ex parte Moses* (1873), L. R. 9 Q. B. 1.

any other university, college, or educational institution which shall be specified in that behalf in accordance with the Solicitors Act, 1877, s. 13 (*l*) ; and a service of *three* years only is required, if he shall have taken a degree (after such examinations and under such circumstances as are mentioned in the Acts) at any of the above universities (*m*), or if he shall have been admitted for three years to the degree of a barrister (*n*), or shall have been, for the term of ten years, a *bonâ fide* clerk to some practising solicitor or proctor (*o*), or if he shall have been admitted and enrolled as a Writer to the Signet, or as a solicitor in the Supreme Courts of Scotland, or as a procurator before any of the sheriff's courts of Scotland (*p*). And, under the Solicitors Act, 1877, section 12, a barrister of five years' standing may, without any period of service, pass the final examination, and be admitted as a solicitor, provided he has procured himself to be disbarred with that intention, and has obtained the certificate of two benchers of his Inn, that he is fit to practise as a solicitor.

Secondly, in order to the clerk's admission and enrolment as a solicitor, it is required of him, that, in addition to and subsequently to such service, he shall have passed a certain examination, called his *final examination*, touching his articles and service, and his fitness and capacity to practise and to be an officer of the Supreme Court (*q*) ;

(*l*) See Regulations made by certain of Her Majesty's Judges and dated 5th December, 1877 ; Act of 1860, s. 5.

(*m*) Act of 1860, s. 2, repealing Act of 1843, s. 7 ; *Ex parte Bradford* (1859), 1 El. & El. 417.

(*n*) Act of 1860, s. 3.

(*o*) *Ibid.* s. 4 ; *In re Sherry* (1868), L. R. 3 Q. B. 164 ; and *Re James* (1885), 33 W. R. 654.

(*p*) Sect. 15.

(*q*) Candidates, before they can be bound under articles of service, must, unless exempted, pass a *preliminary* examination in general knowledge ; and clerks under articles (unless exempted under the Solicitors Act, 1894, on the ground of having obtained a degree in law at some university) have to pass an *intermediate*

and this examination is conducted by the Law Society (*r*). All persons desiring to become solicitors must pass the final examination, except such colonial solicitors as have obtained exemption under the provisions of the Colonial Solicitors Act, 1900 (*s*).

Upon the competency of the candidate for admission being certified, an oath used to be administered to him to the effect, "that he would truly and honestly demean "himself in practice," and also the oath of allegiance; and after such oaths, he was "admitted," and his name was duly enrolled, his admission being first duly written on parchment, and impressed with the proper stamp (*t*). But a simplification in the mode of admission has been effected by the Solicitors Act, 1888 (*u*), by which it was enacted, that, from and after the 1st February, 1889, a candidate, who has obtained from the Law Society a certificate of having passed his final examination, may apply to the Master of the Rolls to be admitted as a

examination, to ascertain the progress they have made in their studies. These two examinations (as well as the *final* examination), are conducted by, and are subject to the regulations of, the Law Society (see Regulations dated 27 November, 1877). The president of the King's Bench Division and the Master of the Rolls have a discretionary jurisdiction as regards the requirements of the Society.

(*r*) The provisions of the Solicitors Act, 1843, as to articles and service thereunder, and as to examinations and admissions, &c., do not apply to the officials following, although sometimes called solicitors, namely:—the solicitor to the Treasury (as to whom, see Treasury Solicitor Act, 1876); the solicitor to the Customs, to the Excise, to the Post Office, to the Inland Revenue, or any other branch of the revenue; the solicitor of the city of London; the solicitor of any public department, such as the Ecclesiastical Commissioners or Queen Anne's Bounty; or to any clerk or officer appointed to act for them (Solicitors Act, 1843, s. 47; and see Act of 1860, ss. 16 and 33; Solicitors Act, 1874, s. 12).

(*s*) See (as to the admission of *colonial* solicitors to practise in England) Solicitors Act, 1888, and Colonial Solicitors Act, 1900; and (as regards solicitors in Ireland) Solicitors (Ireland) Act, 1898.

(*t*) Act of 1877, Sched. II., Pt. II.

(*u*) Sect. 10.

solicitor ; and thereupon the Master of the Rolls, in the absence of any cause to the contrary, is, by writing under his hand, to admit the applicant to be a solicitor. On production of this admission, and on payment of a fee, not exceeding 5*l.*, to the Society, his name is entered by the Society on the roll of solicitors (*x*). The Stamp Duty payable on admission is 25*l.*

The Solicitors Act, 1843, s. 21, provided for the appointment of a *Registrar*, whose duty it should be to keep an alphabetical list or roll of all solicitors, and to issue certificates to persons who had been duly admitted and enrolled (*y*) ; and the duties of this office, which were temporarily committed to the Incorporated Law Society (*z*), and were afterwards discharged by the Clerk of the Petty Bag, have by the Solicitors Act, 1888, been definitely entrusted to the Law Society, as the *Registrar* of Solicitors (*a*).

A certificate from the Registrar, of due admission and enrolment, must be produced to the proper authorities, by any person desirous of practising as a solicitor, in order that it may be duly impressed with the proper stamp duty, authorizing him to practise for the ensuing year (*b*) ; and, in order to obtain the Registrar's certificate, a declaration in writing, (signed by the solicitor desirous of practising, or by his partner, or in some cases by his London agent,) containing his name and address, and the date of his admission, must be delivered to the Registrar (*c*).

(*x*) Sect. 11.

(*y*) *In re a Solicitor*, [1902] 1 K. B. 128.

(*z*) Act of 1843, s. 21.

(*a*) Act of 1888, s. 5.

(*b*) Act of 1843, s. 22 ; Act of 1860, s. 18. The stamp on the *yearly* certificate is regulated by the Stamp Act, 1891 (continuing the like provision contained in the Stamp Act, 1870) as follows :— If the solicitor practises within ten miles from the General Post Office, and has been admitted three years, 9*l.* (or, if he shall not have been admitted three years, 4*l.* 10*s.*) ; if he practises elsewhere, and has been admitted three years, 6*l.* (or, if he has not been so long admitted, 3*l.*).

(*c*) Act of 1843, s. 23 ; but see *In re a Solicitor* (1899), 80 L T. 720.

A solicitor who practises in any court, without having a stamped certificate for the current year, is incapable of maintaining any action to recover his professional charges (*d*), a rule which does not, *semble*, apply to non-litigious business (*e*); but, even as regards litigious business, all proceedings taken therein, although by an uncertificated solicitor, hold and remain good as between and against the parties (*f*), although the costs cannot be recovered either by the uncertificated person or by his client (*g*). Formerly, if the certificate was not renewed yearly, then, after the lapse of one year, it was not renewable without an order of the Master of the Rolls; but under the Solicitors Act, 1888, section 16, the Law Society may simply grant a renewal, or (subject to appeal to the Master of Rolls) refuse to grant a fresh certificate. In the latter case, the Master of the Rolls may, in his judicial discretion, either refuse to interfere, or may direct a fresh certificate to issue on such terms as he may think fit (*h*).

The Solicitors Act, 1843, also contains the following (among other) regulations:—That no solicitor shall have more than two articled clerks at one and the same time, nor any such clerk while he himself acts as a clerk; that a clerk, articled for five years to a solicitor, may serve one of those years as a pupil with a practising barrister, and another with the London agent of the solicitor to whom he is articled (*i*); that a clerk whose master has

(*d*) Act of 1843, s. 26; *Brunswick* v. *Crowd* (1849), 4 Exch. 492.

(*e*) *Richards* v. *Suffield* (1848), 2 Exch. 616; *Greene* v. *Reece* (1849), 8 C. B. 88.

(*f*) *Sparling* v. *Brereton* (1866), L. R. 2 Eq. 64; *Holgate* v. *Slight* (1851), 21 L. J. Q. B. 74; *Brown* v. *Tolley* (1874), 31 L. T. 485.

(*g*) *Fowler* v. *Monmouthshire Railway and Canal Company* (1879), 4 Q. B. D. 334; *Irvin* v. *Sanger* (1888), 58 L. J. Q. B. 64; *Kent* v. *Ward* (1894), 70 L. T. 612.

(*h*) Solicitors Act, 1888, s. 16.

(*i*) Act of 1843, ss. 4, 6. By the Act of 1860, s. 10, the clerk under articles is, with certain excepted cases, restricted (during his term of service) from holding any office, or engaging in any employment, other than that of clerk to his master or his master's partner; but by the Act of 1874,

died or left off business during the term, or whose articles have been cancelled or discharged (*k*), may enter into fresh articles with another master for the residue of the term. But any resulting interval will not be allowed to count as part of his service (*l*).

We will now consider the law relating to solicitors who have been duly admitted, and have duly taken out their certificates, and duly renewed such certificates annually, and (being in all other respects duly qualified) are in actual practice ; and in particular with reference to their work, their professional remuneration, and their professional conduct.

We shall thus consider, although with great brevity, (I.) The privileges and disabilities of solicitors ; (II.) Their retainer, and the duties of their employment ; (III.) Their bills of costs and remuneration generally ; and (IV.) The remedies for and against solicitors, civil and criminal.

I. *The Privileges and Disabilities of Solicitors.*— Solicitors being in actual practice are exempted from serving on juries (*m*), or as parish overseers, churchwardens, constables, and the like (*n*), and generally from all public services of a personal character which might interfere with the due discharge of their professional

s. 4, this restriction is removable, provided the consent in writing of the master be obtained, and the sanction of one of the judges or of the Master of the Rolls. See *Re Peppercorn* (1866), L. R. 1 C. P. 473, and the remarks of Lord Coleridge in *In re Greville* (1873), L. R. 9 C. P. 13.

(*k*) In the event of the master becoming bankrupt, or being imprisoned for debt for twenty-one days, the court may discharge the clerk or assign his articles to a new master (Act of 1843, s. 5) ; and a proportion of the premium paid, may be (but, in general, is not) recoverable on the death of the master (*Ferns* v. *Carr* (1885), 28 Ch D. 409 ; and see *Dufaur* v. *Sigel* (1853), 4 De G. M. & G. 520, and *Craven* v. *Stubbins* (1864), 34 L. J. Ch. 126).

(*l*) Act of 1843, s. 13 ; *Ex parte Wallis* (1862), 2 B. & S. 416.

(*m*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9 ; *In re Dutton*, [1892] 1 Q. B. 486.

(*n*) Parish Constables Act, 1842, s. 6.

duties; but whereas formerly a solicitor was incapable of being a county justice (*o*), his disability in this respect has now been taken away, except as regards the county in which he carries on his practice (*p*). Solicitors are entitled to practise as solicitors before the Privy Council and the House of Lords, in the Court of Appeal and in the High Court; and to practise either as solicitors or as advocates, or as both, in the Bankruptcy Division of the High Court (*q*), in the Ecclesiastical Courts, in the County Courts (*r*), and generally in the inferior courts. They may (subject to the payment of a small fee) practise also as solicitors in the Court of the County Palatine of Lancaster (*s*). But their managing clerks cannot (in effect) claim to be heard as representing them; and it rests with the judge whether he will give them leave to address the court (*t*).

The right to practise does not necessarily carry with it the right of audience. For instance, solicitors have no right of audience before the House of Lords, or the Privy Council, or in the Court of Appeal, or in the High Court so far as open court is concerned (except in the Bankruptcy Division), or in the Mayor's Court, London. But they have a right of audience in both the High Court and the Mayor's Court, so far as chambers are concerned; and also in the Palatine Courts of Durham and Lancaster, and before coroners, and under-sheriffs, and, to a limited extent, before courts-martial. There is one tribunal (viz. the Revising Barrister's Court) before which solicitors have a right of audience

(*o*) Solicitors Act, 1843, s. 33.

(*p*) Justices Qualification Act, 1871.

(*q*) Bankruptcy Act, 1883, s. 151; *In re Elderton*, W. N. (1887), p. 21. But see *Doxford* v. *Sea Shipping Co., Limited* (1897), 14 T. L. R. 111.

(*r*) County Courts Act, 1888, s. 188.

(*s*) Court of Chancery of Lancaster Act, 1850, s. 27.

(*t*) *R.* v. *Snagge*, [1894] 2 Q. B. 440; and see Law Journal, Feb. 14th, 1903, p. 77.

which is denied to counsel (*u*). With regard to quarter sessions, the justices have the same discretion which every other court has to regulate their own proceedings (*x*); although, under the Summary Jurisdiction Act, 1848, section 12, both solicitors and barristers have a right of audience before them on a complaint or information.

Solicitors are privileged from arrest on civil process, while attending the courts in their capacity of solicitors, and while going to and returning from the same (*y*); but they are not privileged from arrest on criminal process, or under a writ of attachment, or order of committal for contempt (*z*). They used also to have this further privilege, namely, that of suing and being sued exclusively in the High Court; but this latter privilege no longer exists, either as to suing (*a*), or as to being sued (*b*).

II. *The Retainer of Solicitors, and the Duties of their Employment.*—The solicitor of a party litigant should, as a general rule, obtain from his client a written authority to act on his behalf; but a verbal retainer is sufficient (*c*),

(*u*) Parliamentary Voters Registration Act, 1843, s. 41.

(*x*) *Collier* v. *Hicks* (1831), 2 B. & Ad. 672; *Ex parte Evans* (1846), 9 Q. B. 279; 15 L. J. Q. B. 335; *R.* v. *Justices of London*, [1896] 1 Q. B. 659.

(*y*) *Re Jewitt* (1864), 33 Beav. 559.

(*z*) *Re Freston* (1883), 11 Q. B. D. 545; *Re Dudley* (1883), 12 Q. B. D. 44.

(*a*) *Blair* v. *Eis'er* (1888), 21 Q. B. D. 185; County Courts Act, 1888, s. 175.

(*b*) *Day* v. *Ward* (1886), 17 Q. B. D. 703.

(*c*) *Wiggins* v. *Peppin* (1839), 2 Beav. 403; and see the remarks of CHITTY, J., in *Wray* v. *Kemp* (1884), 26 Ch. D. 172. A retainer in writing is, however, essential, where it amounts to an agreement not to be performed within a year (*Eley* v. *The Positive, etc. Assurance Co.* (1875), 1 Ex. D. 20); also where the client's name is to be used in any action as next friend or as relator (Order XVI., r. 20); and where the client is a corporation, in which case it must, as a rule, be under seal. But see *Brooks* v. *Mayor, etc. of Torquay*, [1902] 1 K. B. 601).

while, as regards non-contentious business, the retainer is in general implied from the circumstances. The authority may be either a general one, or it may be an authority limited to some particular matter, or to some particular proceeding in the action ; and in either case, it must not be exceeded (*d*). But if his authority is general, the contract is an *entire* contract, and the solicitor must accordingly see the business through to its end, at least as a rule, before he may sue for his remuneration (*e*). Under his general authority, the solicitor may agree to the matter in dispute being referred to an arbitrator ; and may even, *semble*, agree to a compromise of it, unless the client has expressly forbidden a compromise (*f*). But the solicitor may not, before action commenced, compromise his client's claim (*g*), without the express consent of his client. The authority of the solicitor used in general to determine with the signing of final judgment in the action (*h*) ; but now it continues until the conclusion of the whole cause or matter (*i*). A solicitor who commences an action without authority to do so, is personally liable for all the costs thereof (*k*).

In the exercise of his employment, the solicitor must use judgment ; and although privileged from disclosing, and indeed bound not to disclose, the communications and documents of his client, he is not justified in conspiring or combining with him to effect a fraud or a judicial

(*d*) But see *In re Kerly*, [1901] 1 Ch. 467 ; and *In re White, Ex parte Nichols*, [1902] W. N. 114.

(*e*) *Underwood* v. *Lewis*, [1894] 2 Q. B. 306 ; and see *Court* v. *Berlin*, [1897] 2 Q. B. 396.

(*f*) *Fray* v. *Voules* (1859), 1 El. & El. 839 ; *Chown* v. *Parrott* (1863), 14 C. B. (N.S.) 74 ; *Prestwick* v. *Poley* (1865), 18 C. B. (N.S.) 806 ; and see *Carruthers* v. *Newen*, [1903] 1 Ch. 812, and the dicta in *Withers* v. *Parker* (1859), 28 L. J. Exch. 292, there referred to.

(*g*) *Macaulay* v. *Polley*, [1897] 2 Q. B. 122.

(*h*) *Tipping* v. *Johnson* (1801), 2 Bos. & P. 357 ; and see *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43.

(*i*) *De la Pole* v. *Dick* (1885), 29 Ch. D. 351 ; *De Mora* v. *Concha*, W. N. (1887), p. 194.

(*k*) *Schjott* v. *Schjott* (1881), 19 Ch. D. 94.

wrong (*l*). But this matter of privileged communications will be more properly considered hereafter in connection with the proceedings in an action. As regards all private dealings between a solicitor and his client, *e.g.*, in the case of mortgages taken by the solicitor from his client, the utmost good faith must prevail on the solicitor's part (*m*). In case a solicitor is negligent in the conduct of his client's business, and a loss results therefrom to the client, the solicitor is answerable in damages for the loss (*n*).

III. *Solicitors' Bills of Costs, and their Remuneration generally.*—Solicitors as such are entitled to be paid for their professional work ; and they may either enter into a special agreement with their client as regards their remuneration, or they may dispense with such agreement.

First, where they enter into an agreement.—Such an agreement is of a special character, and is, broadly speaking, governed by the Attorneys and Solicitors Act, 1870, and the Solicitors Remuneration Act, 1881. Prior to these Acts, a solicitor might (as he still may) agree his *past* costs, but not costs to be incurred ; but he may now agree his future costs. Such agreement, however, must be in writing (*o*), unless it be merely a promise by the solicitor not to make any charge at all (*p*) ; and it must be signed by the client at all events (*q*), though not necessarily by the solicitor (*r*). A solicitor may agree, of course, to charge nothing for his

(*l*) *R.* v. *Cox* (1884), 14 Q. B. D. 153 ; *Williams* v. *Quebrada Rail. Co.*, [1895] 2 Ch. 751 ; *R.* v. *Bullivant*, [1900] 2 Q. B. 163.

(*m*) *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449 ; *Macleod* v. *Jones* (1883), 24 Ch. D. 289 ; but see *Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 111.

(*n*) *Whiteman* v. *Hawkins* (1878), 4 C. P. D. 13 ; but see *Dooby* v. *Watson* (1888), 39 Ch. D. 178.

(*o*) *Re Russell* (1885), 30 Ch. D. 114.

(*p*) *Jennings* v. *Johnson* (1873), L. R. 8 C. P. 425.

(*q*) *Re Lewis, Ex parte Munro* (1876), 1 Q. B. D. 724.

(*r*) *In re Thompson, Ex parte Baylis*, [1894] 1 Q. B. 462 ; and see *Bewley* v. *Atkinson* (1879), 13 Ch. D. 283.

labour (*s*), or to charge costs out of pocket only (*t*); as a rule, however, he makes no such foolish agreement, but enters into a proper agreement under the Acts. And, seeing that, if the benefit of the Acts is to be obtained, strict regard must be had to their provisions, we will proceed to state these provisions with some particularity.

(1.) By the Attorneys and Solicitors Act, 1870, it is provided, that an agreement may be validly made between a solicitor and his client, respecting the amount and manner of his payment for either past or future services; but such an agreement (so far as it relates to contentious business), must receive the sanction of a taxing officer of the court which has power to enforce the agreement, that is to say, the amount payable under the agreement is not recoverable until the agreement itself has been allowed by such taxing master (*u*). And no action is to be brought on the agreement, so far as it relates to the mode of remuneration (*x*); any question arising under it being determined by the court on motion or petition. Moreover, any provision in the agreement, whereby the solicitor shall not be liable for negligence, or shall be relieved from any responsibility to which he would otherwise be subject, is wholly void; and the agreement, if in any way considered by the courts to be unfair or unreasonable, may be disallowed and set aside. Also, no validity is given by the statute to any purchase by a solicitor of his client's interest in the property involved in the action, or to an arrangement whereby he is to be paid only in the event of the success of the action; both of which transactions are against the policy of the law (*y*). Moreover, the interests of third parties are not to be affected by any such arrangement; and the

(*s*) *Ashford* v. *Price* (1823), 3 Stark. 185; and see *In re Landor*, [1899] 1 Ch. 818.

(*t*) *Jones* v. *Reade* (1836), 5 A & E. 529.

(*u*) *Re Attorneys and Solicitors Act*, 1870 (1875), 1 Ch. D. 573.

(*x*) But see *Rees* v. *Williams* (1875), L. R. 10 Exch. 200.

(*y*) *Re Attorneys and Solicitors Act*, 1870, *ubi sup.*

agreement is to be deemed to exclude all other claims, save in so far as it expressly excepts them.

(2.) By the Solicitors Remuneration Act, 1881, which limits the operation of the Attorneys and Solicitors Act, 1870, to contentious business, it is provided, as regards non-contentious business (that is to say, business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing), that an agreement may be made between a solicitor and his client, before or after or in the course of the business, for the remuneration of the solicitor, as regards both the amount and the manner thereof; the agreement being in writing and signed by the person to be bound thereby, or by his agent in that behalf (*z*). The agreement is to express whether all or some only (and what) disbursements in respect of searches, travelling expenses, stamps, plans, and the like, are to be included or not in the agreed remuneration. And (by section 8, sub-s. 4), it is provided, that "the agreement may be "sued and recovered on, or impeached and set aside, in the "like manner and on the like grounds as an agreement not "relating to the remuneration of a solicitor (*a*); and if, "under any order for taxation of costs, such agreement, "being relied upon by the solicitor, shall be objected to by "the client as unfair or unreasonable, the taxing master or "officer of the court may inquire into the facts, and certify "the same to the court; and if, upon such certificate, it "shall appear to the court or judge that just cause has been "shown either for cancelling the agreement, or for reducing "the amount payable under the same, the court or judge "shall have power to order such cancellation or reduction, "and to give all such directions necessary or proper for the "purpose of carrying such order into effect or otherwise "consequential thereon, as to the court or judge may "seem fit."

(*z*) *In re Frape, Ex parte Perrett*, [1893] 2 Ch. 284, C. A.

(*a*) *Re Gray* (1886), 30 Sol. Journ. 551.

Secondly, where no express agreement as to remuneration has been entered into between a solicitor and his client, either as to contentious business (under the Attorneys and Solicitors Act, 1870), or as to non-contentious business (under the Solicitors Remuneration Act, 1881)—the amount and manner of his remuneration is governed, as to non-contentious business, by the Solicitors Act, 1843, and the Solicitors Remuneration Act, 1881, and the rules thereunder: and as to contentious business, by a vast number of statutes, and of orders and rules thereunder.

(i.) By the Solicitors Act, 1843 (as regards both contentious and non-contentious business), it is provided, that no solicitor shall (as a general rule) commence an action or sue for his fees or charges in respect of any business done by him, although the right of action is complete as soon as the business is done (*b*), until after the expiration of one calendar month (*c*) after a bill of his costs and charges, signed by him, shall have been delivered to the party to be charged (*d*); and such party may, on application, obtain an order referring the bill for taxation, and staying all proceedings for the recovery of the amount thereof in the meantime (*e*), or judgment for the amount to be ascertained on the taxation may (in a proper case) be given (*f*). By the same Act, the client, or party chargeable with the costs, may obtain an order directing the solicitor to deliver his bill of costs, when he has not done so; and the same order (or a further order) will direct the solicitor, on payment, to deliver up all deeds, papers, and other documents of the client in his possession touching the matters comprised in the bill of costs (*g*).

(*b*) *Coburn* v. *Colledge*, [1897] 1 Q. B. 702.

(*c*) In special cases, the judge may order otherwise, *i.e.*, may dispense with this condition precedent (Act of 1877).

(*d*) Act of 1843, s. 37.

(*e*) *Re Nelson* (1885), 30 Ch. D. 1; *Re Thompson* (1885), 30 Ch. D. 441.

(*f*) *Lumley* v. *Brooks* (1889), 41 Ch. D. 323.

(*g*) Act of 1843, s. 37; *Brooks* v. *Beckett* (1847), 9 Q. B. 847; *Ex parte Cobeldick* (1883), 12 Q. B. D. 149; *In re Debenham and Walker*, [1895] 2 Ch. 430.

And even after payment, a bill of costs may, on the ground of special circumstances, *e.g.*, of pressure (*h*) or manifest overcharges (*i*), be ordered to be taxed, provided the application is made within twelve months after payment (*k*); but if it is the intention of the client to object to certain items in the bill as statute-barred, a special order for taxation of the bill must be obtained (*l*).

(ii.) By the Solicitors Remuneration Act, 1881, it was (as regards non-contentious business) enacted, that the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President for the time being of the Law Society, and the President of one of the provincial law societies, to be selected by the Lord Chancellor, (or any three of them, the Lord Chancellor being one,) might from time to time make any General Order for regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action (*m*), or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business. And by section 4 of the same Act it was provided, that any such General Order might, as regards the mode of remuneration, prescribe that it should be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each

(*h*) *Re Bennett* (1845), 8 Beav. 467; *In re Newman* (1867), L. R. 2 Ch. 707; *In re Stephen* (1847), 2 Phillips, 569; and *In re Lacey & Son* (1883), 25 Ch. D. 301.

(*i*) *Re Thompson* (1845), 8 Beav. 237.

(*k*) Act of 1843, s. 41; *Ex parte Pemberton* (1852), 2 De G. M. & G. 960; *In re Wellborne*, [1901] 1 Ch. 312. But see *In re Callis* (1901), 49 W. R. 316, and *In re Collyer-Bristow & Co.*, [1901] 2 K. B. 839.

(*l*) *In re Margetts*, [1896] 2 Ch. 263.

(*m*) *Stanford* v. *Roberts* (1884), 26 Ch. D. 155; *In re Merchant Taylors' Company* (1885), 30 Ch. D. 28; *Humphreys* v. *Jones* (1885), 31 Ch. D. 30. See also the Mortgagees Legal Costs Act, 1895.

document prepared or perused, without regard to length, or in any other mode, or partly in one mode, and partly in another or others. And as regards the amount of the remuneration, it was provided that the order might regulate the same with reference to all or any of the following (among other) considerations, namely, the position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like, the place, district, and circumstances at or in which the business or part thereof is transacted, the amount of the capital money, or of the rent, to which the business relates, the skill, labour, and responsibility involved on the part of the solicitor, the number and importance of the documents prepared or perused, without regard to length, and the average or ordinary remuneration obtained by solicitors in like business at the date of the passing of the Act. And the Act further provided (s. 5), that any such General Order might authorize and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such Order, such remuneration to be ascertained by taxation or otherwise; and might also authorize and regulate the allowance of interest thereon.

A General Order for the regulation of all the above matters was accordingly made, and has been in operation since the 1st January, 1883; and the substance and effect of this order may be roughly stated as follows. As regards non-contentious business (to which alone this Act and the General Order thereunder are applicable), two modes of remuneration are provided, either (1) By the percentage or commission appointed by Schedule I. to the General Order; or (2) By the old method of remuneration as altered by Schedule II. to that Order. The solicitor may elect between the two methods, provided he communicates his election to his client before

entering upon the business; but, if he do not so elect, then the first of these two methods becomes applicable (*n*).

Schedule I. is sub-divided into two parts,—Part I. being in respect of sales, purchases, and mortgages; and Part II. being in respect of leases, agreements for leases, and conveyances at a rent (not being mining leases, or building leases, or agreements for either). Schedule II. provides generally for whatever is not covered by Schedule I., that is to say, for settlements, mining leases or licences and agreements therefor, re-conveyances, transfers of mortgages, and further charges, and generally all other matters of conveyancing (*o*); as also for all matters remaining uncompleted which would (if completed) fall within one or other of the two Parts of Schedule I. (*p*). As regards matters falling within Schedule I., the solicitor's remuneration is to be according to the scale of charges thereby prescribed, being a percentage on the amount of the purchase or mortgage money, or on the rental; and as regards matters falling within Part I. of the schedule, a negotiation fee also, calculated at a percentage on the purchase or mortgage money, is allowed in addition to the conveyancing remuneration, even though the business may be transacted with the solicitor himself in his individual capacity (*q*). But no such negotiation fee is allowed as regards matters falling within Part II. of that schedule (*r*).

As regards the matters regulated by the old system, as altered by Schedule II., the remuneration is not ascertained by percentage, but in the old way by folio, labour, and the

(*n*) *Re Allen* (1887), 34 Ch. D. 433; *Re Field* (1885), 29 Ch. D. 608; *Hester* v. *Hester* (1887), 34 Ch. D. 607.

(*o*) *Stanford* v. *Roberts* (1884), 26 Ch. D. 155.

(*p*) *Newbould* v. *Bailward* (1888), 14 App. Ca. 11.

(*q*) *In re Norris*, [1902] 1 Ch. 741.

(*r*) *Re Field* (1885), 29 Ch. D. 608; *Re Emanuel and Simmonds* (1886), 33 Ch. D. 40; *Re Allen* (1887), 34 Ch. D. 433.

like: and it is a special provision of this schedule, that in special cases the taxing master may, for special reasons, increase or diminish the prescribed allowances. There is also a somewhat similar provision to this, applicable to Schedule I., namely, that in respect of any business which is required to be, and which is, by *special exertion*, carried through in an exceptionally short space of time, the solicitor may be allowed, according to the circumstances, a proper additional remuneration for the special exertion.

For a more complete account of the provisions of this General Order, the reader must be referred to the Order itself, and to the scales prescribed thereby, and to the particular rules comprised in the several parts of Schedule I. and in Schedule II. (*s*). We will add, however, two further remarks, namely:—(1) The remuneration prescribed by Schedule I. does not include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid to public officers on searches, or on registrations, or to stewards of manors, or the like, or any extra work occasioned by changes occurring in the course of the business, *e.g.*, by death, bankruptcy, or the like; and (2) A solicitor may accept from his client security for the amount to become due, and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation; and a solicitor may charge interest at four per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand made upon the client. In cases where such disbursements and costs are payable by an infant, or out of a fund not presently available, such demand may be

(*s*) The general effect of the Order is dealt with in *Parker* v. *Blenkhorn* and *Newbould* v. *Bailward* (1888), 14 App. Ca. 11. Matters of detail are to be found in the *Digest of Decisions and Opinions* published by the Incorporated Law Society in 1887, and the Digests supplemental thereto, 1888 and 1898.

made on the parent or guardian, or the trustee or other person liable.

(iii.) As regards contentious business, where no special agreement as to the solicitor's remuneration has been entered into, the provisions and rules applicable are of too minute and detailed a character to admit of any condensed statement; we can only refer to Order LXV. of the Orders and Rules of 1883, and to the more or less casual references to the costs of litigation in general, and in certain particular kinds or classes of actions, which will be found in our treatment of Civil Injuries, in Book V. of this treatise.

IV. *The Remedies for and against Solicitors, Civil and Criminal.*—It has already appeared incidentally, that either the solicitor (*t*) or the client may obtain an order for the taxation of his costs; and such order is, in the ordinary case, obtained on an *ex parte* application. If the application therefor is made within a year from the delivery of the bill of costs, the order is made as a matter of course, or almost as a matter of course; and if made in the Chancery Division, the order provides also for payment; but if made in the King's Bench Division, the order is merely for taxation. No order for taxation will be made of costs relating exclusively to business done by a solicitor otherwise than as a solicitor (*u*).

Where the order for taxation is not obtainable as of course, it must be obtained on a special application by summons, duly served by the applicant upon the other

(*t*) But the solicitor who presents a petition for the taxation of his own costs is at this disadvantage, that (unless the client attends at the taxation) he has to pay the costs of taxation in any event (see Act of 1843, s. 37, and *In re Woollett* (1844), 12 M. & W. 504; but see dictum of BYRNE, J., in *Re Kingdon and Wilson*, [1902] 2 Ch. 251); whereas, if the petition be presented by the client, and less than one-sixth be taxed off the amount of the bill, the costs of taxation are payable by the latter.

(*u*) *In re Baker, Lees & Co.*, [1903] 1 K. B. 189.

party, such special application being, in general, necessary after the lapse of the year, or after payment, or when the retainer is disputed: and generally, when there is any special circumstance affecting more or less the right to payment.

Speaking generally, there are four ways in which a solicitor can compel payment of the amount due to him for costs: (i.) He may enforce the submission to pay, contained, as we have seen, in the order for taxation, when such order has been made in the Chancery Division; (ii.) he may obtain a "charging order," under sect. 28 of the Solicitors Act, 1860, upon any property that may have been recovered or preserved as the result of any proceeding in any court, in which proceeding he has been employed (*x*); (iii.) he may enforce his lien (*y*); and (iv.) he may bring an action against his client (*z*). Conversely, it may happen that an action is the only remedy of the client against the solicitor, but this is only in very exceptional cases; for, in general, the court exercises over solicitors a very wide summary jurisdiction, on applications intituled in the matter of the solicitor, and sometimes on applications not so intituled (*a*), but of which notice has been duly given to the solicitor (*b*). But it is to be remembered, that this summary jurisdiction is exerciseable only in matters affecting the solicitor as such, *e.g.*, for any misconduct, or breach or failure of his duty as a solicitor (*c*). In all other cases an action must be brought against him in the ordinary way.

The court also exercises a punitive, or disciplinary,

(*x*) See *Ex parte Tweed*, [1899] 2 Q. B. 167; and also *Goodfellow* v. *Gray*, [1899] 2 Q. B. 498; and *In re Cook, Ex parte Cripps*, [1899] 1 Q. B. 863.

(*y*) *In re Taylor, Stileman, and Underwood*, [1891] 1 Ch. 590.

(*z*) *Lumley* v. *Brooks* (1889), 41 Ch. D. 323.

(*a*) *Re Ward* (1862), 31 Beav. 1; *Re Dangar's Trusts* (1889), 41 Ch. D. 178; *Swyny* v. *Harland*, [1894] 1 Q. B. 707.

(*b*) *Slater* v. *Slater* (1888), 58 L. T. (N.S.) 149.

(*c*) *Ex parte Edwards* (1881), 7 Q. B. D. 158; but see *In re Carroll*, [1902] 2 Ch. 175.

jurisdiction over solicitors, when their conduct is of a fraudulent character (*d*) ; or when they are guilty of any contempt of court (*e*) ; or when convicted of a felony (*f*). The punishment may be by commitment to prison or by attachment, or (in the graver classes of cases) by suspension from practice, or by striking off the rolls (*g*), the latter punishment not being in general inflicted, save after a report, formerly of the Master, but now of the Law Society (*h*). It remains to be added, that being struck off the roll of a colonial court does not *per se* entail being struck off the roll of solicitors in England (*i*).

(*d*) *Re Dudley* (1883), 12 Q. B. D. 44.

(*e*) *Re Freston* (1883), 11 Q. B. D. 545.

(*f*) *In re Cooper* (1898), 67 L. J. Q. B. 276.

(*g*) *Re Hardwick* (1883), 12 Q. B. D. 148.

(*h*) Act of 1888, ss. 12, 13. The rules made in 1889 under sect. 15 of this Act are printed in the *Weekly Notes* for 9th February, 1889 (pp. 87—89). Additional rules were made in July, 1889, and April, 1898 ; and the whole in their present form are set out in the *Law Times*, vol. cv., p. 62. Formerly, when a solicitor had been struck off the rolls under sect. 32 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), there was no means by which he could be reinstated (*In re Lamb* (1889), 23 Q. B. D. 477) ; but this has now been altered by the Solicitors Act, 1899 (62 Vict. c. 4) ; *R.* v. *Incorporated Law Society*, [1896] 1 Q. B. 327.

(*i*) *In re a Solicitor, Ex parte Incorporated Law Society*, [1898] 1 Q. B. 331.

BOOK V.

OF CIVIL INJURIES.

CHAPTER I.

OF THE REDRESS OF INJURIES (I.) BY THE MERE ACT OF THE PARTIES; AND (II.) BY THE MERE ACT OR OPERATION OF THE LAW.

We now proceed to the examination of *wrongs*, an inquiry evidently posterior in its nature to the inquiry into *rights*. And wrongs being of two sorts,—*civil injuries* and *crimes*,—we shall in this present Book consider only the first of these species of wrongs, with their appropriate remedies; reserving till the sixth and concluding Book the consideration of the other class of wrongs.

The remedies for civil injuries are principally to be obtained by application to the courts of justice, *i.e.*, by *action*; but, there being certain injuries which require a more speedy remedy than can be had by action, certain extra-judicial or eccentrical remedies are provided. Of these latter we shall first treat, before we consider the remedy by action.

First, we have to consider *Redress by the Mere Act of the Parties*; and, Secondly, *Redress by the Mere Act or Operation of the Law*. There fall to be considered under the first of these two divisions the following

varieties of redress, namely,—(1) Self-defence ; (2) Recaption or Reprisal ; (3) Entry ; (4) Abatement ; (5) Distress ; and (6) the Seizure of Heriots ; and to these may be added (although of a somewhat dissimilar character), (7) Redress by Accord and Satisfaction ; and (8) Redress by Arbitration. And there fall to be considered under the second division (viz., Redress by the Mere Act of the Law) the two following varieties, viz., (1) Retainer ; and (2) Remitter.

1. Redress by the Mere Act of the Parties.

[(1) *Self-defence*, that is to say, the defence of one's self, or the mutual and reciprocal defence of people who stand in the relation of husband and wife, or of parent and child, or of master and servant. If a man be forcibly attacked in his person or property, it is lawful for him to repel force by force, any breach of the peace which may ensue being chargeable upon him only who began the affray (*a*). And the law only requires that no more force be used than is necessary ; for, if the resistance exceed the bounds of mere defence, then the defender himself becomes the aggressor (*b*). And what a man may do in his own defence, he may also do in defence of his wife, or of his child, or of his servant ; also, a child may defend his parent, and a servant his master, and, probably, a wife her husband.

(2) *Recaption or Reprisal.*—This mode of redress may be resorted to when any one deprives another of his property in goods, or wrongfully detains his wife, child, or servant. In all these cases, the owner of the goods, or the husband, parent, or master, may lawfully retake them, wherever he happens to find them ; retaking them peaceably, and not in a riotous manner, or with unneces-

(*a*) 2 Roll. Abr. 546 ; 1 Hawk. P. C. 131 ; Bac. Abr. *Master and Servant* (P).

(*b*) 1 Hale, P. C. 485, 486. *Vide post*, bk. VI. c. IV.

[sary violence, or so as to occasion a breach of the peace (*c*). If, for instance, my horse is wrongfully taken away, and I find him on a common, or in a fair, or at a public inn, I may lawfully retake him into my possession; but if he is in a private stable, or in private grounds, I may not break open the stable or break into the private grounds to take him out, my only remedy in such latter case being an action to recover the animal or his value, together with damages for the detention (*d*).

(3) *Entry.*—This is the remedy given to the party himself, for an injury to his *real* property, where the injury consists in his dispossession of the property by another person without any right to the possession thereof. In such a case, the party entitled may make a formal but peaceable entry on the lands, declaring that thereby he retakes the possession, which notorious act of ownership is equivalent to the old feodal investiture by the lord; and he may enter on part of the property, in the name of the whole. But if the estate lies in different counties, he must make different entries; for the notoriety of an entry to the freeholders of Westmoreland, is not any notoriety to the freeholders of Sussex (*e*). Also, if there be two disseisors, the party disseised must make his entry on both; or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both (*f*), for, as their seisin is distinct, so also must be the act which divests that seisin. Also, the remedy by entry must be pursued in a peaceable manner, and not with force or a strong hand (*g*), a forcible entry being an indictable offence (*h*); for, if one turns another (although

(*c*) *Blades* v. *Higgs* (1861), 10 C. B. (N.S.) 713.

(*d*) *Higgins* v. *Andrewes* (1618), 2 Roll. R. 55, 56; *Masters and Poole's Case*, *ib.* 208; 2 Roll. Abr. 565, 566; *Chilton* v. *Carrington* (1855), 15 C. B. 730.

(*e*) Co. Litt. 252 b.

(*f*) Co. Litt. 252.

(*g*) *Newton* v. *Harland* (1840), 1 Man. & G. 644; *Harvey* v. *Brydges* (1845), 14 M. & W. 442.

(*h*) *Beddall* v. *Maitland* (1881), 17 Ch. D. 174; *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199.

[wrongfully in possession) out of his possession forcibly, this amounts to a breach of the peace and is punishable accordingly (*i*).

(4) *Abatement.*—A fourth species of remedy by the mere act of the party injured, is when he *abates*, that is, removes, a nuisance ; and, in general, every nuisance may be abated by the party aggrieved thereby, provided he commit no riot in the abating of it (*k*), nor occasion any damage, beyond what the abatement necessarily requires (*l*). Thus, if a house or wall is erected by my neighbour, so near to mine that it stops my antient lights, I may enter his land and peaceably pull it down (*m*) ; and if the boughs of his trees are allowed to grow so as to overhang my land, I may, on his refusal or neglect to remove such part of them as are in that position, peaceably effect the removal myself (*n*). Also, if a new gate be erected across a public highway, any person passing that way may cut it down and destroy it (*o*).

(5) *Distress.*—A fifth way in which the law allows a man to minister redress to himself, is by allowing him to *distrain* the goods of another for the non-payment of rent, or to distrain cattle *damage feasant* (that is, trespassing upon or doing damage to his land or to animals thereon (*p*)). And as the law of distress is a subject of great use and consequence, it shall here be considered

(*i*) 5 Ric. 2 (1381), st. 1, c. 7 ; 15 Ric. 2 (1391), c. 2 ; and 31 Eliz. (1589), c. 11 ; 4 Inst. 176 ; 21 Jac. 1 (1624), c. 15 ; *R.* v. *Wilson* (1835), 3 A. & E. 817 ; *R.* v. *Harland* (1838), 8 A. & E. 826 ; *Lowes* v. *Telford* (1876), 1 App. Ca. 414.

(*k*) 2 Rep. 101 ; 9 Rep. 55 ; *Houghton* v. *Butler* (1791), 4 T. R. 364.

(*l*) *Cooper* v. *Marshall* (1757), 1 Burr. 259 ; *Lodie* v. *Arnold* (1696), 2 Salk. 458.

(*m*) *R.* v. *Rosewell* (1697), 2 Salk. 459.

(*n*) *Norris* v. *Baker* (1612), 1 Roll. Rep. 394 ; *Lodie* v. *Arnold* (1696), 2 Salk. 458 ; *Lemmon* v. *Webb*, [1894] 3 Ch. 1 ; [1895] A. C. 1.

(*o*) *James* v. *Hayward* (1630), Cro. Car. 184.

(*p*) See *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

[with some minuteness: by inquiring, first, for what injuries a distress may be taken; secondly, what things may be distrained: and thirdly, the manner of taking, disposing of, and avoiding distresses.

First, the injuries for which a distress may be taken. The most usual injury is the non-payment of rent. The right of distress being incident, by the common law, to every *rent service*, and, by particular reservation and modern statute, to *rent charges* also, and the same remedy having been extended by the Landlord and Tenant Act, 1730, to *rents seck*, *rents of assize*, and *chief rents*, a distress may now be taken for any kind of rent in arrear, the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it (*q*);] and a distress may be taken also for any apportioned part of a rent (*r*). But as it is of the definition of rent, that its amount shall be certain, or at the least be capable of being reduced to a certainty, where the sum to be paid by the occupier is not fixed by agreement, but depends on what shall be considered as a reasonable compensation for the use and occupation of the premises, no distress for it can legally be made (*s*). Also, the rent must be in arrear before any distress for it may be taken; and it is not in arrear until the day after the day fixed for its payment. But the rent may, of course, be made payable in advance; although usually it is payable at the end of the period for which it is due.

[Another injury, for which distresses may be taken, is where a man finds a stranger's beasts wandering in his grounds *damage feasant*; in which case, supposing the trespass not to be rendered excusable by the defective state

(*q*) *Bradbury* v. *Wright* (1781), 2 Doug. 624; *Norman* v. *Anderton* (1806), 2 Bos. & P. (N.R.) 224; *Giles* v. *Spencer* (1857), 3 C. B. (N.S.) 244; *Buttery* v. *Robinson* (1826), 3 Bing. 392.

(*r*) *Riris* v. *Watson* (1839), 5 M. & W. 255.

(*s*) *Regnart* v. *Porter* (1831), 7 Bing. 451; *Warner* v. *Potchett* (1832), 3 B. & Ad. 928; *Dunk* v. *Hunter* (1822), 5 B. & Ald. 322.

[of his own fences, or the like (*t*), the owner of the soil may distrain them, while they so remain on his grounds, till satisfaction be made him for the injury he has thereby sustained.] But if he so distrain, he cannot, while he holds the distress, also sue for the damage (*u*). It is said, that this remedy by distress extends also to inanimate things doing damage (*x*).

There are, also, other kinds of distresses introduced, in special cases, for the recovery of duties and penalties imposed by Act of Parliament (*y*); and there is also a right of distress for a neglect to do suit in the lord's court, or to pay amercements legally imposed by a court leet or court baron (*z*).

Secondly, the things which may be taken in distress. [In general, all chattels personal, unless particularly protected or exempted, may be taken in distress; and instead, therefore, of mentioning what things are distrainable, it will be easier to enumerate those which are exempted, with the reason of the exemption (*a*). And, (1.) Articles and things which were formerly considered as having no intrinsic value, or wherein a man could have no absolute property, (as dogs (*b*), cats, rabbits, and the like, and all animals *feræ naturæ*,) are exempted from distress; but if deer are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing

(*t*) 2 Wms. Saund. 284 e, n. (4).

(*u*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

(*x*) *Id.*; *Amberyate, etc. Rail. Co.* v. *Midland Rail. Co.* (1853), 2 El. & Bl. 793.

(*y*) For example, for the assessments made by the Commissioners of Sewers (Commission of Sewers Act, 1708; Land Drainage Act, 1861, s. 38); and for poor rates (Poor Relief Act, 1601 and 1743, s. 7; Poor Law Amendment Act, 1834, s. 49; *In re Elizabeth Allen*, [1894] 2 Q. B. 924).

(*z*) Co. Litt. 96; 2 Wms. Saund. 168, n. (1); Bro. Abr. in tit. *Distresses*, 15; Scriven, *Copyholds* (7th ed.), pp. 446, 447.

(*a*) Co. Litt. 47.

(*b*) Dogs are included in this statement by Blackstone (Comm. ii., 2), and in the previous editions of this book; but it is doubtful whether dogs would not now be held to be distrainable. (See 1 Sm. L. C. (11th ed.), 446—7.)

[them to a kind of stock or merchandize, that they may be distrained for rent (*c*). (2.) Whatever is in the personal use or occupation of any man, is for the time privileged from distress, in order to prevent the danger, which might otherwise arise, of a breach of the peace (*d*); as, for example, an axe with which a man is cutting wood, or a horse while a man is riding him. (3.) Things delivered to a person following a public trade, to be carried, wrought, or managed in the way of such his trade, are exempted from distress (*e*); as a horse sent to a smith to be shod, or standing in a common inn, or cloth in a tailor's house (*f*), or corn sent to a mill or market, or goods sent to an auctioneer to be sold (*g*). But with these exceptions, all goods and chattels found upon the premises, *whether they in fact belong to the tenant or to a stranger*, are distrainable by the landlord for rent (*h*),] subject (as regards the beasts, or sheep and cattle, of a stranger) to the temporary protection to be presently mentioned, and subject (as regards lodgers' goods) to the qualified protection given by the Lodgers' Goods Protection Act, 1871. By that Act, it has been provided, that a lodger, whose goods and chattels have been distrained for rent, may serve the distraining landlord (or his bailiff) with a written declaration, stating that his (the lodger's) landlord has no right of property or beneficial interest in the goods and chattels in question, but that they are the property or in the lawful possession of the lodger, and also stating that nothing or

(*c*) *Davies* v. *Powell* (1737), Willes, 47.

(*d*) *Storey* v. *Robinson* (1795), 6 T. R. 138; *Field* v. *Adames* (1840), 12 A. & E. 649.

(*e*) *Simpson* v. *Hartopp* (1744), Willes, 512; *Gisbourn* v. *Hurst* (1709), 1 Salk. 250; *Muspratt* v. *Gregory* (1838), 3 M. & W. 677; *Joule* v. *Jackson* (1841), 7 M. & W. 454; *Gibson* v. *Ireson* (1842), 3 Q. B. 39; *Findon* v. *M'Laren* (1845), 6 Q. B. 891; *Miles* v. *Furber* (1873), L. R. 8 Q. B. 77.

(*f*) *Read* v. *Burley* (1596), Cro. Eliz. 549.

(*g*) *Williams* v. *Holmes* (1853), 8 Exch. 861; *Lyons* v. *Elliott* (1876), 1 Q. B. D. 210.

(*h*) *Francis* v. *Wyatt* (1764), 3 Burr. 1498; *Crosier* v. *Tomkinson* (1754), 2 Ken. 439; *Parsons* v. *Gingell* (1847), 4 C. B. 545.

only a specified amount is due by the lodger to his landlord for rent; and along with such declaration he may pay or tender the rent (if any) so stated to be due by him. And if, after such declaration (and payment or tender), the distraining landlord proceeds with the distress, he is deemed guilty of an illegal distress, and the goods may be recovered by the lodger on the order of two justices or of a stipendiary magistrate (*i*). [And with reference to the *beasts* of a stranger found on the tenant's land, although, if they are put in by consent of the owner of the beasts, they are, by the common law, immediately distrainable for rent in arrear, as they also are distrainable if they break the fences to come on the land (*k*), yet if the lands are not sufficiently fenced so as to keep out cattle, the beasts are exempted from distress, unless and until they have been *levant* and *couchant* (*levantes et cubantes*) on the land—that is, have been long enough there to have lain down and risen up to feed, which in general is held to be one night at least; after which the law presumes that the owner has had notice that his cattle have strayed, and it is then his own negligence not to take them away (*l*). And yet, even where the beasts have been *levant* and *couchant*, if the obligation to repair the fences lies on the landlord or on his tenant, the beasts are not distrainable till actual notice has been given to the owner that they are there, and he neglects after such notice to remove them (*m*); for the law will not suffer the landlord to take advantage of his own or his tenant's wrong (*n*). (4.) Things in the custody of the law, as where they have been already taken on a distress or in execution, are not distrainable (*o*). In the case of an

(*i*) *Phillips* v. *Henson* (1877), 3 C. P. D. 26; *Sharp* v. *Fowle* (1884), 12 Q. B. D. 385; *Heawood* v. *Bone* (1884), 13 Q.B.D. 179.

(*k*) Co. Litt. 47.

(*l*) Gilb., *Distress* (3rd ed.), 47.

(*m*) *Kimp* v. *Cruwes* (1695), 2 Lutw. 1580.

(*n*) *Poole* v. *Longuevill* (1669), 2 Saund. 289.

(*o*) Co. Litt. 47 a; *Smith* v. *Russell* (1811), 3 Taunt. 400; *Wright* v. *Dewes* (1834), 1 A. & E. 641. See also Sale of Farming Stock Act, 1816, s. 6

[execution, however, the goods cannot be removed under it without payment of the rent in arrear (not exceeding one year's arrears) (*p*). If the tenant has become bankrupt, the distress must be limited to six months' arrears (*q*). Any growing crops seized and sold in an execution, so long as they remain on the lands, are, in default of other sufficient distress, liable to be distrained upon for rent becoming due after the seizure and sale (*r*);] and where the execution is under the warrant of a county court, the landlord's claim for rent must also be provided for (*s*). [(5.) Money is not distrainable, unless it has been placed in a *sealed bag* (*t*). (6.) Nothing may be distrained for rent, which may not be rendered again in as good plight as when it was distrained (*u*), for which reason, milk, fruit, and the like cannot be distrained; also, sheaves or shocks of corn could not at one time have been distrained, because some damage must needs accrue in their removal, though a cart loaded with corn might be distrained, as that could be safely restored. But now, by the 2 W. & M. (1690), c. 5, corn as soon as it is reaped, and also hay, may be distrained, as freely as other chattels (*x*). (7.) Fixtures, or things fixed to the freehold, as caldrons, windows, doors, and chimney-pieces, may not in general be distrained, for they savour of the realty (*y*), nor trees and shrubs in a nursery (*z*); and growing corn could not be distrained, till the Distress for Rent Act, 1737,

(*p*) Landlord and Tenant Act, 1709; Execution Act, 1844, s. 67.

(*q*) Bankruptcy Act, 1890, s. 28, amending Act of 1883, s. 42.

(*r*) Landlord and Tenant Act, 1851, s. 2.

(*s*) County Courts Act, 1888, s. 160.

(*t*) 1 Roll. Ab. 667; Vin. Abr. *Dist.* (H.); *Wilson* v. *Ducket* (1675), 2 Mod. 61.

(*u*) *Darby* v. *Harris* (1841), 1 Q. B. 895; *Morley* v. *Pincombe* (1848), 2 Exch. 101.

(*x*) *Johnson* v. *Faulkner* (1842), 2 Q. B. 925; *Hawkins* v. *Walrond* (1876), 1 C. P. D. 280.

(*y*) *Niblet* v. *Smith* (1792), 4 T. R. 504; *Dalton* v. *Whittem* (1842), 3 Q. B. 961; *Darby* v. *Harris* (1841), 1 Q. B. 895; *Hellawell* v. *Eastwood* (1851), 6 Exch. 295; *Turner* v. *Cameron* (1870), L. R. 5 Q. B. 306.

(*z*) *Clark* v. *Gaskarth* (1818), 8 Taunt. 431.

[empowered landlords to distrain any corn or other products of the earth while still growing, and to cut and gather them when ripe (*a*).] (8.) By the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), waggons, trucks, carriages of all kinds, and locomotive engines used on railways, while at work in or on any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty in or on which there is any railway siding, if bearing a proper metal plate or mark indicating the actual owner thereof, are prohibited from being distrained for rent payable by the tenant of such colliery or other work. (9.) By the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4, all goods and chattels of a tenant or his family are exempt from distress, if and so far as they would be protected from seizure in execution under sect. 147 of the County Courts Act, 1888, that is so say, the wearing apparel and bedding (*b*) of the tenant and his family, and the tools and implements of the tenant's trade not exceeding 5*l.* in value; and if any of these last-mentioned exempted articles are distrained upon, there will be a summary order for their restoration, or (in case they have been already sold) for the payment of their value (*c*). And there is a similar provision in the Summary Jurisdiction Act, 1879, s. 21 (2).

[Besides the preceding articles, which are *absolutely* privileged, there are others which are privileged *sub modo*, viz., beasts of the plough (*averia carucæ*), and sheep, and instruments of husbandry, and also the instruments of a man's trade or profession, as the axe of a carpenter, the books of a scholar, and the like (*d*); for as to all of these, the rule is, that they are exempt from distress, *provided there be other sufficient distress on the*

(*a*) *Miller* v. *Green* (1831), 8 Bing. 92.

(*b*) Which includes bedstead (*Davis* v. *Harris*, [1900] 1 Q. B. 729).

(*c*) Law of Distress Amendment Act, 1895, s. 4.

(*d*) *Nargett* v. *Nias* (1859), 1 El. & El. 439.

[*premises, but not otherwise* (*e*).] And, by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 45, live stock belonging to another person, and taken in by the tenant of any holding to which the Act applies to be fed at a fair price (that is to say, cattle that are *agisted*) (*f*), is not to be distrained for rent, *when there is other sufficient distress to be found;* and where there is no other sufficient distress, such live stock may be distrained, *but only to the extent of the price for the agistment thereof that then remains due*, and it may be redeemed by the true owner thereof upon payment of such price (*g*). By virtue of the same Act, agricultural machinery belonging to another person, and *bonâ fide* hired to the tenant, is exempted from distress, as likewise is all live stock of another person which is on the land solely for breeding purposes.

Thirdly, let us next consider how distresses may be taken, disposed of, or avoided. [Although distresses were formerly looked upon in no other light than as a mere pledge, yet distresses for *rent* being found by the legislature to be an effectual method of compelling the payment of the rent, many beneficial enactments have, from time to time, been made for allowing the things taken to be *sold;*] and with regard also to distresses of beasts which have been impounded, these also may now, under the provisions of the Cruelty to Animals Act, 1854, amending the Cruelty to Animals Act, 1849, be sold after seven days, and the proceeds appropriated to repay the impounder double the value of the food he has provided and the expenses, the overplus, if any, being rendered to the owner.

[In pointing out the methods of distraining, we shall in general suppose the distress to be made for rent, only

(*e*) Co. Litt. 47 a; 2 Inst. 132; *Gorton* v. *Falkner* (1792), 4 T. R. 565; *Hutchins* v. *Chambers* (1758), 1 Burr. 579; *Piggott* v. *Birtles* (1836), 1 M. & W. 441; *Keen* v. *Priest* (1859), 4 H. & N. 236.

(*f*) *Masters* v. *Green* (1888), 20 Q. B. D. 807.

(*g*) *London and Yorkshire Bank* v. *Belton* (1885), 15 Q. B. D. 457, where the price of the agistment was "milk for meat."

[remarking, where necessary, the difference between such a distress and one taken for any other cause.

In the first place, then, all distresses must be made *by day*, unless in the case of *damage feasant* (*h*); an exception being there allowed, lest the beasts should escape before they are taken (*i*). And when a landlord intends to make a distress he must, by himself or his bailiff (who must be a bailiff duly certificated by the county court) (*k*), make entry on the demised premises. And this formerly must have been during the continuance of the lease; but now, (by the Landlord and Tenant Act, 1709,) if the tenant holds over, the landlord may distrain within six months after the determination of the lease, provided his own title or interest, as well as the tenant's possession, continue at the time of the distress (*l*). If the lessor does not find sufficient distress on the premises, he could, as the law once stood, resort nowhere else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock, fraudulently, from the house or lands demised, in order to cheat their landlords. But now, by the Landlord and Tenant Act, 1709, and the Distress for Rent Act, 1737, a landlord may distrain any goods of his tenant, carried off the premises *fraudulently or clandestinely*, wherever he finds them, within thirty days after the removal, provided they have not been meanwhile *bonâ fide* sold for a valuable consideration; and all persons privy to, or assisting in, such fraudulent conveying away, forfeit double the value of the goods to the landlord (*m*). The landlord may also distrain the beasts of his tenant, feeding upon any commons or wastes appendant or appurtenant to the demised premises (*n*). It is to be

(*h*) 7 Rep. 7 a.

(*i*) Co. Litt. 142.

(*k*) Law of Distress Amendment Act, 1888, s. 7; 58 & 59 Vict. c. 24, ss. 1, 2.

(*l*) *Taylerson* v. *Peters* (1837), 7 A. & E. 110.

(*m*) *Miller* v. *Green* (1831), 8 Bing. 92.

(*n*) *Angell* v. *Harrison* (1847), 17 L. J. Q. B. 25; *Dibble* v. *Bowater* (1853), 2 El. & Bl. 564.

[noticed, that the landlord, in order to distrain, may not break open the outer door of his tenant's house, or warehouse, or open an outer window: for that is a breach of the peace (*o*). But he may climb over an outer wall and enter the house by an open window (*p*); and when he is once in the house, he may break open an inner door. And if goods have been fraudulently removed from the premises and locked up to prevent a distress, he may, with the assistance of a police officer, break open, in the day time, any place whither they have been so removed; oath being first made to a justice, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein (*q*).

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once; and not for part at one time and part at another (*r*). But if he distrain for the whole, and there be not sufficient on the premises, or if he happen to mistake the value of the thing distrained, and so take an insufficient distress, he may take a second distress to complete his remedy (*s*).

Distresses must be proportioned to the rent in arrear; and by the Statute of Marlbridge, (52 Hen. III. c. 4,) if any man take a great or unreasonable distress, he shall be heavily amerced for the same. Thus, if the landlord distrain two oxen for twelve pence rent, the taking of *both* is an unreasonable distress; but if there were no other distress nearer the value to be found, he might reasonably distrain *one* of them (*t*). And for homage or fealty, or suit and service, it is said that no distress can be ex-

(*o*) Co. Litt. 161; *Nash* v. *Lucas* (1867), L. R. 2 Q. B. 590; *American Meat Co.* v. *Hendry* (1893), 62 L. J. Q. B. 388.

(*p*) *Long* v. *Clarke*, [1894] 1 Q. B. 119; *Eldridge* v. *Stacey* (1863), 15 C. B. (N.S.) 458.

(*q*) Distress for Rent Act, 1737.

(*r*) *Lee* v. *Cooke* (1858), 3 H. & N. 203.

(*s*) Cro. Eliz. 13; stat. 17 Car. 2 (1665), c. 7; *Hutchins* v. *Chambers* (1758), 1 Burr. 579.

(*t*) 2 Inst. 107.

[cessive (*u*); for as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distress is by a special action grounded on the Statute of Marlbridge, the ordinary action of trespass not being maintainable upon this account; for an excessive distress is no injury at the common law (*x*).

When the distress is thus taken, the next consideration is the disposal of it; and for that purpose, the things distrained must in the first place be impounded. For, until impounded, they may be *rescued* by the owner; in case the distress was without cause, or contrary to law. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out, for they are then in the custody of the law (*y*). By the 2 W. & M. (1690), c. 5, an action for treble damages will lie for illegally taking out of pound a distress for *rent;* and by the Pound-breach Act, 1843, if any person shall release, or attempt to release, cattle lawfully seized by way of distress, from the place where they are impounded, *or on the way to or from such place*, or shall destroy the pound, or any part thereof, he shall, on conviction before two justices of the peace, be liable to a penalty not exceeding 5*l.*, and to payment of the reasonable charges and expenses, and (in default) may be committed to the house of correction, with hard labour, for not more than three calendar months nor less than fourteen days. But, by the 1 & 2 Ph. & M. (1554), c. 12, no distress of cattle can be driven out of the hundred

(*u*) Bro. Abr. tit. *Assize*, 291, *Prerogative*, 98.

(*x*) 1 Ventr. 104; Fitzgib. 85; *Fisher* v. *Algar* (1826), 2 C. & P. 374; *Hutchins* v. *Chambers* (1758), 1 Burr. 579; *Roden* v. *Eyton* (1848), 6 C. B. 427; *Tancred* v. *Leyland* (1851), 16 Q. B. 669; *Glynn* v. *Thomas* (1856), 11 Exch. 870.

(*y*) Co. Litt. 47, 160, 161. When once impounded it is not necessary that the landlord should retain actual possession of the goods (*Jones* v. *Bierustein*, [1900] 1 Q. B. 100).

[where it is taken, unless to a pound overt (*z*) within the same shire, and within three miles of the place where it was taken, which provision is for the benefit of the tenants, that they may know where to find and replevy the distress; and by the Distress for Rent Act, 1737, a person distraining cattle for rent may turn any part of the premises, upon which the distress is taken, into a pound *pro hâc vice*, for securing of such distress (*a*).] If animals be impounded, the onus of their support is on the distrainor, the Cruelty to Animals Act, 1849, ss. 5, 6, requiring him to supply them with sufficient food and water, under a penalty of twenty shillings, for every refusal or neglect, to be adjudged by a justice in a summary way; but he is entitled, of course, to recover his outlay for food and water, and, by the Cruelty to Animals Act, 1854, he may recover even double the value of the food supplied as well as the other expenses (*b*). Moreover, a [distress of household goods, or other dead chattels, which are liable to be stolen, or damaged by weather, ought to be impounded in a pound covert; else the distrainor must answer for the consequences (*c*).

The goods when impounded having been formerly only in the nature of a pledge, on that account it was held, that the distrainor was not at liberty to work or use a distrained beast (*d*); though he might milk cows taken in distress, for that was for the benefit of the owner (*e*). And

(*z*) A pound open overhead is a pound *overt*, as distinguished from a pound *covert* (or pound covered in).

(*a*) *Washborn* v. *Black* (1774), 11 East, 405 n. (a); *Pitt* v. *Shew* (1821), 4 B. & Ald. 208; *Swann* v. *Earl Falmouth* (1828), 8 B. & C. 456; *Woods* v. *Durrant* (1847), 16 M. & W. 149; *Johnson* v. *Upham* (1859), 2 El. & El. 250; *Tennant* v. *Field* (1857), 8 El. & Bl. 336.

(*b*) *Dargan* v. *Davies* (1877), 2 Q. B. D. 118.

(*c*) *Mason* v. *Newland* (1840), 9 C. & P. 575; *Wilder* v. *Speer* (1838), 8 A. & E. 547; *Bignell* v. *Clarke* (1860), 5 H. & N. 485.

(*d*) *Smith* v. *Wright* (1861); 6 H. & N. 821.

(*e*) *Bagshawe* v. *Goward* (1606), Cro. Jac. 147.

[thus the law still continues with regard to distresses for suit or service, for these must remain impounded till the owner makes satisfaction ; or until he contests the right of distraining, by replevying the chattels, a proceeding of which we shall presently say more. The distress therefore in these cases, though it puts the owner to inconvenience, and is consequently a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, is no remedy at all to the distrainor. But for a debt due to the Crown, unless paid within forty days, the distress was always saleable, even at the common law (*f*) ; and afterwards it was expressly provided by several Acts of Parliament (*g*), that in all cases of distress for rent, if the owner did not, within *five days* after the distress was taken, and notice of the cause thereof given him, replevy the same with sufficient security, the distress might be appraised by two appraisers, and sold towards satisfaction of the rent and charges (*h*), the overplus, if any, being rendered to the owner himself (*i*). This is now substantially the law relating to the sale of goods taken in distress for rent,] it being nevertheless remembered, that, by the Law of Distress Amendment Act, 1888 (*k*), s. 5, making general a similar provision contained in the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), ss. 50, 51, the goods need not now be *appraised* before sale, unless the tenant, or other the owner of the goods, in writing requires such appraisement to be made. By the same Act (sect. 6), the period of *five* days may be extended to a period of not more than *fifteen* days, if the tenant, or other the owner of the goods, in writing requests such

(*f*) Bro. Abr. tit. *Distress*, 71.

(*g*) 2 W. & M. (1690), c. 5 ; Landlord and Tenant Act, 1709 ; Landlord and Tenant Act, 1730 ; Distress for Rent Act, 1737 ; Distress (Costs) Act, 1817.

(*h*) *Wilson* v. *Nightingale* (1846), 8 Q. B. 1034 ; *Lucas* v. *Tarleton* (1858), 3 H. & N. 116.

(*i*) *Knight* v. *Egerton* (1852), 7 Exch. 407 ; *Evans* v. *Wright* (1857), 2 H. & N. 527 ; *Hart* v. *Leach* (1836), 1 M & W. 560.

(*k*) 51 & 52 Vict. c. 21.

extension, and gives the prescribed security. But it ought to be further mentioned that, by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 44, a landlord may not distrain (as regards tenancies to which that Act is applicable) for rent which became due more than a year before the distress, the Act providing, however, that where a quarter year, or half a year, beyond the legal day of payment, is ordinarily allowed for payment of the rent, the rent shall, for the purposes of this limitation on the right of distress, be deemed to become due on the expiration of such quarter year or half year (*l*). And note, that, equally as in the case of distresses of cattle *damage feasant*, a landlord distraining for rent cannot, while he holds the distress, sue for the rent (*m*).

[As for the proceeding called a replevin, it will be sufficient for the present to state, that to replevy, (*replegiare*, to take back the pledge,) is when a person who has been distrained upon for rent, or for cattle damage feasant, or for suit and service, applies to the proper authority (that is to say, to the registrar of the county court) to interpose (*n*) : and thereupon he has the distress returned into his own possession, giving security to try the right of taking it, in a particular action (called the action of replevin), wherein the owner of the goods is the plaintiff and the distrainor the defendant, and engaging, in the event of being unsuccessful, to return the distress into the hands of the distrainor.

The many particulars which require to be observed in the taking of a distress, used formerly to make a distress a hazardous kind of proceeding, especially as, if any one irregularity was committed, it vitiated the whole, and made the distrainor a trespasser *ab initio* (*o*). But now,

(*l*) *Ex parte Bull, In re Bear*, (1887), 18 Q. B. D. 642.

(*m*) *Lehain* v. *Philpott* (1875), L. R. 10 Exch. 242.

(*n*) County Courts Act, 1888, s. 134 ; Agricultural Holdings Act, 1883, s. 46. See, *post*, bk. v., ch. vii.

(*o*) *The Six Carpenters' Case* (1610), 8 Rep. 146 b ; 1 Sm. L. C. 132 ; *Attack* v. *Bramwell* (1863), 3 B. & S. 520.

[by the Distress for Rent Act, 1737, s. 19, it is provided, that where any distress shall be made for any kind of *rent* justly due, and any subsequent unlawful act or irregularity shall be committed by the party distraining, the distress itself shall not therefore be deemed unlawful, or the parties making it trespassers *ab initio* (*p*) ; but the party grieved shall only have an action for the real damage sustained, and not even that, if tender of amends is made before any action is brought (*q*).

(6) *The Seizing of Heriots due on the Death of a Tenant.*—This species of self remedy is not unlike that of taking cattle or goods in distress (*r*) ; and for that species of heriot which is called heriot-service, the lord may distrain as well as seize. But for heriot custom, (which Sir Edward Coke says lies only in *prender*, and not in *render*,) the lord, though he may seize the identical thing itself, cannot distrain any other chattel for it (*s*). The like speedy and effectual remedy by *seizure* is given with regard to many things that are said to lie in franchise, as waifs, wrecks, estrays, and the like ; all of which the persons entitled thereto may seize, without the aid of a court. Not that they are debarred of their remedy by action, but they have also this other, and more speedy remedy, for the better asserting their property ; the thing to be claimed being frequently of such a nature, that it might be out of the reach of the law before any action could be brought.

(7) *Redress by Accord and Satisfaction.*—An *accord* is an agreement to make satisfaction, entered into between the party injuring and the party injured, which, when performed, is a bar of all actions upon the same account.

(*p*) *Gambrell* v. *Earl of Falmouth* (1836), 5 A. & E. 403.

(*q*) *Harvey* v. *Pocock* (1843), 11 M. & W. 740 ; *Rodgers* v. *Parker* (1856), 18 C. B. 112.

(*r*) As to heriots, *vide sup.* vol. I. p. 127.

(*s*) Co. *Cop.* s. 25 ; *Odiham* v. *Smith* (1593), Cro. Eliz. 390 ; *Major* v. *Brandwood* (1632), Cro. Car. 260.

[As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action. But if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action (*t*).] And note, that in an action by several plaintiffs for a joint demand, the defendant may plead an accord and satisfaction with any *one* of them (*u*).

But it is to be observed, first, that the action will not be taken away by mere accord without actual satisfaction; *e.g.*, in the case supposed, the mere agreement to accept the sum of money will not, until actual payment of the amount, bar the action on the original agreement to build the house or deliver the horse. For this would only be substituting one right of action for another. And secondly, that the taking a smaller sum of money in lieu of a greater sum of fixed or certain amount, does not answer to the legal idea of satisfaction; *e.g.*, if a man owe 100*l.*, an agreement between him and his creditor that he shall pay 50*l.* in satisfaction, will not, though the latter sum be actually paid, suffice in law to bar the action on the original debt. But if anything except money be taken in lieu of a fixed sum of money, the action for the latter will be barred, however much its amount may exceed the value of the thing so accepted (*x*). And, thirdly, that if the joint obligees are entitled to the debt as tenants in common in equity (and not as joint tenants), an accord and satisfaction made to one of them will be no defence to a subsequent action by the others (*y*).

(*t*) 9 Rep. 79.

(*u*) *Wallace* v. *Kelsall* (1840), 7 M. & W. 264; *Thurman* v. *Wild* (1840), 11 A. & E. 453; *Jones* v. *Broadhurst* (1850), 9 C. B. 173.

(*x*) *Cumber* v. *Wane* (1718), Stra. 426; 1 Sm. L. C. (11th ed.) 338; *Pinnel's Case* (1601), 5 Rep. 117 a; *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Goddard* v. *O'Brien* (1882), 9 Q. B. D. 37; *Foakes* v. *Beer* (1884), 9 App. Ca. 605; *Day* v. *McLea* (1889), 22 Q. B. D. 610; *Bidder* v. *Bridges* (1887), 37 Ch. D. 406.

(*y*) *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537.

[(8) *Redress by Arbitration.—Arbitration* is where the parties injuring and injured submit all matters in dispute, concerning any personal chattel or personal wrong, to the judgment of one or more *arbitrators*, who are to decide the controversy (*z*) ; and it is usual, if there is more than one arbitrator, to add, that another person be called in, if they fail to agree, as *umpire*, to whose sole judgment the dispute is then referred. The decision, in any of these cases, must be in writing, and is called an *award ;* and thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice (*a*).] And even some criminal offences, *e.g.*, ordinary assaults (*b*), and nuisances (*c*), and the like, for which the party injured may (at his option) either prosecute or sue (*d*), may be thus disposed of. Originally, the submission to arbitration might have been either by word of mouth or by deed. But in either case the submission was revocable ; and it became the practice therefore to enter into mutual bonds, with condition to stand to the award, or, in default thereof, to pay a certain penalty.

Experience having shown the great use of these peace-

(*z*) The legislature has prescribed this remedy in a variety of special cases—*e.g.*, in questions as to *tithes and commons* (Tithe Act, 1836 ; Inclosure Act, 1845) ; as to compensation for lands taken for *undertakings of a public nature* (Companies Clauses and Lands Clauses Consolidation Acts, 1845, the latter being amended by 46 & 47 Vict. (1883), c. 15) ; for *railways* (Railways Clauses Consolidation Act, 1845) ; for *markets and fairs* (Markets and Fairs Clauses Act, 1847) ; for *water works* (Waterworks Clauses Act, 1847) ; for *harbours, docks, and piers* (Harbours, etc. Clauses Act, 1847) ; for *improvements in towns* (Towns Improvement Clauses Act, 1847) ; for *land drainage* (Land Drainage Acts, 1847 and 1861) ; and for *cemeteries* (Cemeteries Clauses Act, 1847).

(*a*) Brownl. 55 ; 1 Freem. 410.

(*b*) *Elworthy* v. *Bird* (1825), 2 Sim. & St. 372.

(*c*) *Dobson* v. *Groves* (1844), 6 Q. B. 637.

(*d*) *R.* v. *Hardey* (1850), 14 Q. B. 529 ; *R.* v. *Blakemore*, *ib.* 544.

able and domestic tribunals, especially in matters of account, the legislature established the use of them, as well in controversies where causes were depending, as in those where no action was brought; enacting by the 9 Will. III. (1697), c. 15 (since repealed), that all who desired to end any such controversies might agree in writing that their submission to arbitration or umpirage should be made a rule, *i.e.*, an order of court, whereupon the court was to make a rule that such submission, and award made thereon, should be conclusive. And, after such rule, the parties disobeying the award were liable to be punished as for a contempt of court, unless, indeed, the award was set aside for corruption, or for undue means used in its procurement, or for other misbehaviour in the arbitrators or umpire, proved on oath to the court, on an application made within one Term after the award was made (*e*). In consequence of this statute, it became an important part of the business of the courts to enforce the execution of such awards; and an award might be enforced either by action on the award, or by process of contempt for disobedience to the rule of the court (*f*). Subsequently, by the Civil Procedure Act, 1833, it was provided, that the power of any arbitrator or umpire appointed in pursuance of a submission containing such agreement as aforesaid to make the arbitration a rule of court, or appointed by any rule of court, or judge's order, in any action, should not be revocable by either party without the leave of the court; but although, after that Act, such an agreement to refer to arbitration could not have been revoked by one of the parties thereto without the consent of the other, the appointment of a particular arbitrator pursuant to the agreement might still have been revoked before award made (*g*).

The two last-mentioned Acts, with certain others in

(*e*) *College of Christ* v. *Martin* (1877), 3 Q. B. D. 16.

(*f*) *R.* v. *Hemsworth* (1846), 3 C. B. 745.

(*g*) *Piercy* v. *Young* (1879), 14 Ch. D. 200; *Re Fraser and Ehrensperger* (1883), 12 Q. B. D. 310.

amendment thereof, have now been repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), by which it has been provided (among other things), that every submission in writing (sect. 27), unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court, and shall have the same effect in all respects as if it had been made an order of the court (sect. 1). This Act has also further enacted as follows: That if no other mode of reference is provided, the reference shall be to a single arbitrator; that if the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make their award; that the arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award; that if the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators; that the umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award; that the parties to the reference, and all persons claiming through them respectively, shall (subject to any legal objection) submit to be examined by the arbitrators or umpire on oath or affirmation, in relation to the matters in dispute, and shall (subject as aforesaid) produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, and documents within their possession or power respectively, which may be required or called for, and shall do

all other things which during the proceedings on the reference the arbitrators or umpire may require; that the witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation; that the award to be made by the arbitrators or umpire shall be final and binding on the parties, and the persons claiming under them respectively; and that the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, these costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client (*h*). And the Act further provides, that the arbitrators or umpire shall, unless the submission expresses a contrary intention, have power to state their award as to the whole or part of the matters comprised in the submission, in the form of a special case (*i*) for the opinion of the court; and also to correct any clerical mistake or error in the award, arising from any accidental slip or omission (sect. 7).

As to the effect of an award, it is in general, and as a consequence of the provision in that behalf contained or implied in the submission, conclusive and final. And upon an action or other proceeding brought to enforce it, no defence, other than a denial of the submission, can be raised *unless in respect of some defect apparent on the face of the award itself;* the rule being that any *extrinsic* objection must be taken in the shape of a substantive application to the court to set aside the award (*k*). And with reference to the setting aside of awards, it is proper to observe as follows: That an award might always have been set aside on any ground which

(*h*) Sect. 2, and Sched. I.

(*i*) *I.e.*, a statement of the facts on which the court, after argument, gives its decision as to the law.

(*k*) *Braddick* v. *Thompson* (1807), 8 East, 344; *Paull* v. *Paull* (1833), 2 C. & M. 235; *Grazebrook* v. *Davis* (1826), 5 B. & C. 534; *Macarthur* v. *Campbell* (1834), 2 A. & E. 52.

rendered it an illegal award (*l*); and before the award was made, the arbitrator (or umpire) might, if shown to be personally improper to act in the matter, have been restrained by injunction from acting under the reference (*m*), and, in a proper case, the court would have directed the arbitrator (or umpire) as to the law applicable to the case, where he was proceeding contrary to such law (*n*). And it is now provided, by the Arbitration Act, 1889 (sect. 10), that, in all cases of reference to arbitration, the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire, and (sect. 11) that where an arbitrator or umpire misconducts himself, the court may remove him; and where either the arbitrator or umpire has misconducted himself, or the arbitration or award has been improperly procured, the court may set aside the award. And it has been further provided, by the same Act (sect. 19), that any referee, arbitrator, or umpire, at any stage of the proceedings under a reference, may, and shall if so directed by the court or a judge, state in the form of a special case, for the opinion of the court, any question of law arising in the course of the reference. An application to set aside an award must now be made before the last day of the *sittings* next after the award has been made and published (*o*); the application being no longer by motion *ex parte*, but by motion *on notice*, the notice specifying the grounds of the application (*p*).

The time for making the award is that agreed upon in the submission; and when no time is therein specified, it is three months (*q*). But in either case the court or a

(*l*) *Mercier* v. *Pepperell* (1881), 19 Ch. D. 58.

(*m*) *Beddow* v. *Beddow* (1878), 9 Ch. D. 89; *Pescod* v. *Pescod* (1888), 58 L. T. 76.

(*n*) *Hart* v. *Duke* (1862), 32 L. J. Q. B. 55; *East and West India Docks Co.* v. *Kirk and Randall* (1887), 12 App. Ca. 738; and disting. *James* v. *James* (1889), 22 Q. B. D. 669.

(*o*) Ord. LXIV. r. 14.

(*p*) Ord. LII. rr. 3, 4.

(*q*) Arbitration Act, 1889, s. 2, and Sched. I.

judge may extend the time (*r*), though in no case beyond the ultimate period (if any) prescribed by statute (*s*). And where the court has *remitted* an award, then (unless the order otherwise directs) the arbitrator or umpire is to make his award within three months after the date of the order (*t*).

The award, once it has been duly made, may, unless set aside, be enforced, on an application to the court or a judge, in like manner as a judgment or order of the court to the like effect may be enforced (*u*), *e.g.*, by execution or process for contempt.

II. Redress by the mere Act or Operation of the Law.

(1) *Retainer* is where a debtor makes his creditor executor of his will, or where the creditor obtains letters of administration to his debtor. In both of these cases, the law gives the creditor a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any others whose debts are of equal degree (*x*). [Which remedy is by the mere act of the law, and is grounded upon this reason, that the executor or administrator cannot sue himself, but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose; for otherwise, by being made executor, he would be put in a worse condition than all the other creditors. But, as the law stands, the effect of this right of retainer is to put the executor or administrator in a better position than the other creditors; because it enables him to obtain payment *first*, (among all creditors of equal degree,) and before any other has had time to commence an action. And this seems to illustrate a remark of Lord Bacon, that the

(*r*) *Lord* v. *Lee* (1868), L. R. 3 Q. B. 404; *Re May and Harcourt* (1884), 13 Q. B. D. 688; Arbitration Act, 1889, s. 9.

(*s*) *In re Mackenzie* (1886), 17 Q. B. D. 114.

(*t*) Act of 1889, s. 10.

(*u*) *Ibid.* s. 12.

(*x*) 1 Roll. Abr. 922; Plowd. 543.

[benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse (*y*). However, the executor shall not retain his own debt in prejudice to creditors of a higher degree ; for the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt, which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt to the prejudice of that of his co-executor in equal degree ; but both shall be discharged in proportion (*z*). Nor shall an executor of his own wrong (*a*) be in any case permitted to retain (*b*).] Moreover, the right of retainer exists in respect of *legal* assets only (*c*) ; and these must have come to the hands of the executor (*d*). But the remedy by retainer, when it is available, extends to claims for damages arising on the breach of pecuniary contracts, when such damages are ascertainable by a recognized standard or measure (*e*).

An administrator who (under the covenant of his intestate) is entitled to an annuity, may retain out of the estate all arrears of the annuity accruing due during the administration of the estate ; but (when the estate is insolvent) he cannot retain any lump sum on account of the continuing liability to pay the annuity (*f*). Similarly, an executor may retain out of a legacy any sums paid by the testator

(*y*) Bac. *Elem.* ch. 9.

(*z*) Vin. Abr. tit. *Executors*, D. 2.

(*a*) Commonly called an *executor de son tort*, *i.e.*, one who, without being appointed executor or administrator, intermeddles with or takes upon himself the administration of the estate.

(*b*) 5 Rep. 30.

(*c*) *Richmond* v. *White* (1879), 12 Ch. D. 361 ; *Campbell* v. *Campbell* (1880), 16 Ch. D. 198 ; *Crowder* v. *Stewart* (1880), 16 Ch. D. 368 ; *Walters* v. *Walters* (1881), 18 Ch. D. 182.

(*d*) *Norton* v. *Compton* (1885), 30 Ch. D. 15.

(*e*) *Loane* v. *Casey* (1774), 2 W. Bl. 965.

(*f*) *Fowler* v. *James*, [1896] 1 Ch. 48.

as a surety for the legatee (*g*); but not anything on account of the continuing liability of the testator's estate as surety (*h*).

[(2) *Remitter* is where he who hath the property in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent (and, of course, defective) title; in which case he is remitted or sent back, by operation of law, to his antient and more certain or perfect title (*i*). For the possession which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one; his defeasible estate being, in a sense, merged therein, and utterly defeated or annulled by the instantaneous act of the law, without his participation or consent (*k*). Thus, if A. disseise B. (that is, turn B. out of possession of the freehold), and afterwards (without deed) demise the land to B. as tenant from year to year, under which demise B. entereth, this entry is a remitter to B., who is in of his former and surer estate (*l*). But if the demise for years had been by deed or by matter of record, there B. would not have been remitted; for if a man by *deed* takes a lease of his own lands, it shall bind him to the rent and covenants, because he shall never be allowed to affirm, that his own deed is ineffectual. And matter of record is evidence, which a man cannot controvert (*m*). And the reason given by Littleton, why this remedy by remitter was allowed, is because otherwise he who hath right would be deprived of all remedy (*n*); for as he himself is in possession of the land, and cannot therefore enter upon himself, there is no person upon whom he can make entry (*o*).]

(*g*) *In re Watson*, [1896] 1 Ch. 925.

(*h*) *In re Binns*, [1896] 2 Ch. 584.

(*i*) Litt. ss. 659, 693, 695; Co. Litt. 363 b; Gilb. *Ten.* 129; 1 Sand. *Uses*, 166; *Doe* v. *Woodroffe* (1842), 10 M. & W. 608; 15 *ib.* 769.

(*k*) Co. Litt. 358; *Wood* v. *Sir J. Shurley* (1618), Cro. Jac. 488.

(*l*) Litt. s. 695; Gilb. *Ten.* 129.

(*m*) Gilb. *Ten. ubi sup.*

(*n*) Litt. s. 661; Litt. by Butl. 347 b. n. (1).

(*o*) Litt. s. 693; Gilb. *Ten. ubi sup.*; Co. Litt. by Butl. *ubi sup.*

CHAPTER II.

OF THE COURTS IN GENERAL.

[We now proceed to consider the redress of injuries by action ; and here it will not be improper to observe, that although, in the several cases of redress by the act of the parties mentioned in the previous chapter, the law allows an extra-judicial remedy, yet that does not exclude the ordinary remedy by action. Thus, though I may defend myself from external violence, I yet am entitled alternatively to an action of assault and battery ; and though I may retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action for their seizure and detention. I may either abate a nuisance by my own authority, or call upon the law to do it for me ; and I may either distrain for rent, or have an action of debt for the amount. But before entering upon the nature and the varieties of actions, it is convenient to consider the courts themselves, their nature and incidents, and the varieties of them.

First, a court is defined to be a place wherein justice is judicially administered (*a*). All courts of justice are derived from the power of the Crown ; for, whether created by Act of Parliament or letters patent, or subsisting by prescription,—the only three methods by which any court of judicature can exist,—the king's consent in the two former is expressly, and in the latter is impliedly, given (*b*). In all these courts, the king is supposed, in contemplation of law, to be always present, being represented by his judges, whose power is only an emanation from his royal

(*a*) Co. Litt. 58. (*b*) Co. Litt. 260.

[prerogative. And for the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review.

Some of these courts are *inferior* and others *superior*; some have a jurisdiction at *common law* and some *in equity*, and some in both; others have an *ecclesiastical* or *maritime* jurisdiction only; and in others again, these various jurisdictions are combined. We shall consider all these varieties of courts in their respective places; but we may here mention one distinction that runs through them all, viz., that some of them are courts *of record*, and others *not of record*. A court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the records of the court; and records are of such high and super-eminent authority, that their truth is not to be called in question. For nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary (*c*). And if the existence of a record be denied, it shall be tried by nothing but itself, that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But this rule does not prevent the court from enquiring, *e.g.*, whether the record (in the case of a judgment debt) was based on no consideration, a matter which is often very material in bankruptcy (*d*); also, if there appear any mistake of the clerk in making up the record, the court will direct him to amend it.] And in general, all slips in legal proceedings (including records)

(*c*) Co. Litt. 260; *sup.* vol. I. p. 21.

(*d*) *In re Tollemache* (1885), 14 Q. B. D. 415, 606; *In re Lennox* (1885), 16 Q. B. D. 316; *Ex parte Scotch Whisky Distillers* (1888), 22 Q. B. D. 83.

may be amended by an order of the court, to be obtained in a summary way (*e*).

[All courts of record being the courts of the king, in right of his crown and royal dignity (*f*), every court of record has authority to fine and imprison for contempt of its authority (*g*) ; so that the very erection of a new jurisdiction with the power of fine or imprisonment for contempt, makes it a court of record (*h*).] But in some courts of record, *e.g.*, in county courts, this power is limited to contempts committed *in facie curiæ*, that is to say, to wilful insults to the judge, or to any juror or witness, registrar or other officer of the court, during his attendance in court, or in going to or returning from the court, and to wilful interruptions of the business of the court, and to wilful misbehaviour in court (*i*). [Courts *not* of record, on the other hand, are courts of inferior dignity, and in a less proper sense the king's courts, and these are not, as the general rule, intrusted by the law with any power to fine or imprison for contempt (*j*) ; and in these, the proceedings not being enrolled or recorded, as well their existence as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury (*k*).

To every court there must be at least three constituent

(*e*) Ord. XXVIII. (1883), r. 11 ; *Mellor* v. *Swire* (1885), 30 Ch. D. 239 ; *Staniar* v. *Evans* (1886), 34 Ch. D. 470.

(*f*) Finch. L. 231.

(*g*) 8 Rep. 38 b ; Hawk. b. 2, ch. 22, s. 1 ; Bac. Ab. *Courts*, E. ; *R.* v. *Clement* (1821), 4 B. & Ald. 218 ; *R.* v. *Davison* (1821), 4 B. & Ald. 329 ; *R.* v. *James* (1822), 5 B. & Ald. 894 ; *Miller* v. *Knox* (1838), 4 Bing. N. C. 574 ; *Doe* d. *Cardigan* v. *Bywater* (1849), 7 C. B. 794.

(*h*) *Groenvelt* v. *Burwell* (1700), Salk. 200 ; *Ex parte Fernandez* (1861), 10 C. B. (N.S.) 3 ; *R.* v. *Castro* (1873), L. R. 9 Q. B. 219.

(*i*) County Courts Act, 1888, ss. 162, 163, re-enacting like provisions in County Courts Act, 1846, s. 113, and County Courts Act, 1849, s. 2 ; *Levy* v. *Moylan* (1850), 10 C. B. 189 ; *R.* v. *Lefroy* (1873), L. R. 8 Q. B. 134.

(*j*) *Dyson* v. *Wood* (1824), 3 B. & C. 449.

(*k*) 2 Inst. 311 ; 8 Rep. 38 b ; 11 Rep. 43 b.

[parts, the *actor*, the *reus*, and the *judex;* the *actor*, or plaintiff, who complains of an injury done: the *reus*, or defendant, who is called upon to make satisfaction for it: and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. It is also usual, in the higher courts, to have solicitors and counsel as assistants.]

Of solicitors and counsel we have already spoken elsewhere in this work (*l*); and we shall now only observe, with reference to their connection with courts of justice, that a solicitor answers to the *procurator*, or proctor, of the civilians and canonists, being one who is put in the place, stead, or *turn* of another, to manage his proceedings in a cause. For this reason he used to be called an *attorney-at-law*, though the name of solicitor is now adopted by statute (*m*). [Formerly, every suitor was obliged to appear in person, to prosecute or defend his suit, unless by special licence under the king's letters patent; but, as in the Roman law (*n*), so with us, upon the principle of convenience,] it is now permitted, in general, that solicitors may prosecute or defend in the absence of the parties to the action. An infant sues by a next friend and defends by a guardian; and it is the next friend or the guardian who appoints the solicitor (*o*). This rule used also to apply to married women, who sued by their next friends and defended with their husbands; but since the Married Women's Property Act, married women can sue or be sued without their husbands or next friends.

Solicitors are, as we have seen, now formed into a regular body [and are duly admitted to the execution of

(*l*) As to solicitors, *vide sup.* pp. 244—65; as to counsel, *sup.* vol. i. pp. 6—8.

(*m*) Judicature Act, 1873, s. 87.

(*n*) Inst. Lib. 4, tit. 10.

(*o*) Bro. Abr. tit. *Ideot*, 4; Co. Litt. 135 b; 2 Saund. 212, n (4); *Beverley's Case* (1603), 4 Rep. 123 b; *Oulds* v. *Sansom* (1810), 3 Taunt. 261; F. N. B. 25.

[their office. They are officers of the courts in which they practise; and as they have many privileges on account of their attendance there, so they are peculiarly subject to the animadversion of the judges.] Of advocates, or as we otherwise generally call them, *counsel*, there formerly were two species or degrees, namely, barristers and serjeants. Barristers are admitted after a period of study, in the Inns of Court, and (in our old books) are styled "apprentices," *apprenticii ad legem*, not having been deemed qualified to execute the full office of an advocate till they were of sixteen years' standing; at which time, according to Fortescue, they might be called to the state and degree of serjeants, or *servientes ad legem* (*p*). How antient and honourable the degree of serjeant was, hath been so fully displayed by many learned writers, that it need not be here enlarged on (*q*); it is sufficient to observe, that serjeants at law were bound, by a solemn oath, to do their duty to their clients (*r*). It used also to be the custom for the judges to be admitted into this venerable order before they were advanced to the bench (*s*); the original of which was probably to qualify the barons of the exchequer to become justices of assize (*t*). But the necessity for this rule has now ceased, and with it the custom, it having been enacted, by the Judicature Act, 1873, s. 8, that no person appointed a judge, either of the High Court of Justice or of the Court of Appeal, shall be required to take or to have taken the degree of serjeant at law. And no serjeants have in fact been created since the year 1875.

[From among the general body of counsel some are from time to time selected, who (on the nomination of the lord

(*p*) De LL. c. 50.

(*q*) See Fortesc. ch. 50; 10 Rep. pref.; Dugdal. *Orig. Jurid.*; *Case of the Serjeants*, 1840 (6 Bing. N. C. 235); a tract by Serjeant Wynne, printed in 1765, entitled *Observations touching the Antiquity and Dignity of the Degree of Serjeant at Law*; and the treatise called *Serviens ad Legem*, by Mr. Serjeant Manning.

(*r*) 2 Inst. 214.

(*s*) Fortesc. ch. 50.

(*t*) 14 Edw. 3 (1340), st. 1, c. 16.

[chancellor) are made by letters patent his Majesty's counsel; and the two principal king's counsel are called the attorney-general and the solicitor-general. The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, but he was so made *honoris causâ*, and without either patent or fee (*u*); so that the first of the modern order (who are now the sworn servants of the Crown) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles the Second (*x*). These counsel of the Crown answer in some measure to the advocates of the revenue, *advocati fisci*, among the Romans; for they must not be employed in any cause against their sovereign, without special licence (*y*), in which restriction, they agree with the advocates of the fisc (*z*). But, in the imperial law, the prohibition was carried still farther; for, excepting in some peculiar causes, the fiscal advocates were not permitted to be concerned at all in private suits between subject and subject (*a*).

In addition to the creation of counsel to the Crown, a custom has in modern times prevailed of granting letters patent of precedence among themselves, to such barristers as it is thought proper to honour with that mark of distinction; whereby they are entitled to such rank and pre-audience as are assigned in their respective patents (*b*), which is sometimes next after the attorney-general, but usually next after the counsel to the Crown then being. Barristers with patents of precedence rank promiscuously

(*u*) See his *Letters*, 256.

(*x*) See his *Life*, by Roger North, 37.

(*y*) Hence a king's counsel cannot plead in court for the defendant in a criminal prosecution, without a licence from the Crown. But this licence is never refused, being procured at an expense of about 2*l*. 2*s*.

(*z*) Cod. 2, 2, 1.

(*a*) *Ibid.*, 7, 13.

(*b*) It may be noticed, that when there is a *queen consort*, her attorney and solicitor-general rank with those of the king's counsel who have patents of precedence. (Seld. *Tit. of Hon.* 1, 6, 7.)

[with the king's counsel, and sit together with them *within* the bar of the respective courts, instead of sitting *without* it, as is the case with counsel in general (*c*) ; but they are not the sworn servants of the king, and, consequently, without any licence had for that purpose, may accept a retainer in any cause against the Crown. And they, and all other counsel, may indiscriminately take upon them the protection and defence of any *suitors*, whether plaintiffs or defendants (*d*) ; who are therefore called their *clients*, like the dependents upon the antient Roman orators.

The Roman orators, it is to be remembered, practised *gratis ;* for honour merely, or at most for the sake of gaining influence. And so likewise it is established with us, that a counsel can maintain no action for his fees (*e*) ; which are given, not as *locatio vel conductio*, but as *quiddam honorarium*, not as a salary or hire, but as a mere

(*c*) It may be observed, that, in the Court of Exchequer there were formerly appointed by the court two barristers, called the *post*-man and the *tub*-man (from the places in which they sat), who had a precedence in motions. (See *R.* v. *Bishop of Exeter* (1840), 7 M. & W. 188.)

(*d*) At one time, an exception to this existed as regarded the Court of Common Pleas, the serjeants having the exclusive privilege of being heard in that court, at its sittings in *banc*. And though, in 1834, a warrant issued under the sign manual, directing that this privilege should cease, yet the Court of Common Pleas refused to act upon its authority, and decided that, as the privilege was founded on immemorial usage, it could not be taken away by the *warrant* of the Crown. (*Case of the Serjeants* (1840), 6 Bing N. C. 235.) However, it was enacted, by the Parliamentary Voters Registration Act, 1843, s. 61, that, in appeals to the Common Pleas from the revision courts, all barristers should be entitled to audience ; and afterwards, by 9 & 10 Vict. (1846), c. 54, (see 3 C. B. 537), it was provided generally, that all barristers, according to their respective rank and seniority, should have equal right and privilege of practising, pleading, and audience, in the Common Pleas, together with the serjeants.

(*e*) Davis, pref. 22 ; 1 Ch. Rep. 38 ; and as regards the effect of a *special contract* to pay a fixed sum of money, instead of the usual fees, see *Kennedy* v. *Brown* (1863), 13 C. B. (N.S.) 677 ; *Mostyn* v. *Mostyn* (1870), L. R. 5 Ch. 457 ; and *The Queen* v. *Doutre* (1884), 9 App. Ca. 745.

[gratuity, which a counsellor cannot demand without doing wrong to his reputation (*f*). And so it was also laid down with regard to advocates in the civil law (*g*), whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money (*h*).]

It is also deserving of notice, that a counsel may, on his client's behalf, compromise the case, without any express instructions so to do (*i*); but not contrary to express directions, nor can he disregard an express limit imposed by the client on his authority (*k*). [Also, that in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden, that a counsel is not answerable for any matter by him spoken in court relative to the cause in hand, and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless (*l*). But he is not therefore privileged to repeat the same matters out of court (*m*); and even in court, if he mention an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action at the suit of the party injured (*n*). Also, counsel guilty of deceit or collusion were, by the statute of Westminster the First (3 Edw. I.), c. 28, made punishable with imprison-

(*f*) Davis, 23.

(*g*) Ff. 11, 6, 1.

(*h*) Tac. *Ann.* 1, 11, 7.

(*i*) *In re Hobler* (1844), 8 Beav. 101; *Mole* v. *Smith* (1820), 1 Jac. & W. 673; *Swinfen* v. *Swinfen* (1856), 18 C. B. 485; 1 C. B. (N.S.) 364; 24 Beav. 554; *Chambers* v. *Mason* (1858), 5 C. B. (N.S.) 59; *Swinfen* v. *Lord Chelmsford* (1860), 5 H. & N. 890; *Strauss* v. *Francis* (1866), L. R. 1 Q. B. 379.

(*k*) *Neale* v. *Gordon Lennox*, [1902] A. C. 465.

(*l*) *Hodgson* v. *Scarlett* (1818), 1 B. & Ald. 232; *Munster* v. *Lamb* (1883), 11 Q. B. D. 588.

(*m*) *Flint* v. *Pike* (1825), 4 B. & C. 473.

(*n*) *Brook* v. *Sir H. Montague* (1605), Cro. Jac. 90.

[ment for a year and a day, and perpetual silence in the courts, a punishment that even in more modern times has been inflicted for gross misdemeanors in practice (*o*).] We may close our consideration of courts in general with this remark, that, with rare exceptions, solicitors and counsel enjoy the exclusive privilege of transacting business in the courts ; and the usage is for the solicitor to see the client and to instruct the counsel (*p*). Also, the work in chambers falls in general to solicitors, and the work in open court to barristers, who used to have an exclusive privilege in this latter respect (*q*). But in recent times, counsel have been entitled to and do attend in chambers ; and, as we have elsewhere noticed, solicitors may now, in certain of the courts, appear as advocates.

(*o*) Ray, 376.

(*p*) *Doe* d. *Bennett* v. *Hale* (1850), 15 Q. B. 171.

(*q*) *Collier* v. *Hicks* (1831), 2 B. & Ad. 663 ; Plac. Ab. 137 ; Canc. Rot. 22, *temp.* 32 Hen. 3 ; Matt. Par. Hist. p. 1077.

CHAPTER III.

OF THE INFERIOR COURTS.

We are next to consider the several species of courts; and we shall treat in this chapter of the Inferior Courts, reserving for the next chapter the Supreme Court of Judicature and the House of Lords. And first, we may make this general observation with regard to all inferior courts, viz., that under the provisions of the Judicature Acts hereinafter considered, it is lawful for his Majesty from time to time, by Order in Council, to confer on any inferior court of *civil* jurisdiction the same jurisdiction in equity as has been conferred on the modern county courts, and the same jurisdiction in admiralty as has been conferred on certain of the county courts. And every inferior court which now has, or hereafter shall have jurisdiction in equity, or at law and in equity, and in admiralty respectively, is to have power to grant, and is required to grant, such relief, redress, or remedy, and to give such and the like effect to any ground of defence or counter-claim, equitable or legal, in as full and ample a manner, as the High Court of Justice itself: even to the extent that if the defence or counter-claim involves matter beyond the jurisdiction of the court, its duty is to dispose of the whole controversy so far as relates to the demand and the defence, unless either party objects in writing to the jurisdiction (*a*).

The inferior courts are principally (*b*) the following: (I.) The Court Baron: (II.) The Hundred Court;

(*a*) Judicature Act, 1884, s. 18.

(*b*) There are others still exercising jurisdiction, as, for instance, the Liverpool Court of Passage, and the County Palatine Court of Lancaster.

(III.) The Sheriff's County Court ; (IV.) The Borough Court ; (V.) The Courts of the Commissioners of Sewers ; (VI.) The County Courts ; (VII.) The Stannaries Court (now the County Courts of Cornwall) ; (VIII.) The Ecclesiastical Courts ; (IX.) The Courts of the Universities of Oxford and Cambridge ; and (X.) The Court of Chivalry, and Courts Martial. But some of these courts are now practically obsolete.

I. [*The Court Baron* is a court incident to every manor in the kingdom, to be holden by the steward within the manor (*c*). It is of two natures (*d*)—the one a customary court, in which the steward of the manor is the judge, and the *copyholders* are the suitors, and their estates are transferred by surrender and admittance, and other matters are therein transacted relative to their copyhold estates ;] and the other a court of common law, held before the *freehold* tenants who owe suit and service to the lord of the manor, and who are *pares* of each other, and of which court the steward of the manor is merely the registrar and not the judge. But the two species of courts baron, though in their nature distinct, are frequently confounded together. The freeholders' court (with which alone, as being a court of *justice*, we are now concerned) was antiently held every three weeks ; and its most important business was to determine, in the antient species of *real* action called the "writ of right," all controversies relating to *lands* within the manor (*e*), which jurisdiction was, however, greatly curtailed by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 36, and was afterwards, in effect, abolished by the Common Law Procedure Act, 1860, s. 26. The court baron had also jurisdiction in any *personal* action, wherein the debt or damages claimed did not amount to 40*s.* (*f*) ; but the action might always have been removed into the superior

(*c*) 4 Inst. 268.
(*d*) Co Litt. 58.
(*e*) 3 Bl. Com. p. 34.
(*f*) Finch, 248.

court, either before judgment, by writ of *pone* or of *accedas ad curiam* (*g*), or, after judgment, by writ of *false judgment* (*h*). By the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 14, provision was made enabling the lord of "any hundred, honor, manor, or liberty," having any court in right thereof in which debts or demands might be recovered, to surrender the right of holding such court, a provision which has been re-enacted in sect. 6 of the County Courts Act, 1888 (51 & 52 Vict. c. 43); but as the court baron never ranked as a court *of record*, it fell within the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 28, which enacted that no action, which could be brought in any county court, should thereafter be commenced or be maintainable in any hundred or other inferior court, not being a court of record.

II. [*The Hundred Court* was only a larger court baron, being held for all the inhabitants of a particular hundred, instead of a manor. The free suitors were here also the judges, and the steward, properly, the registrar, as in the case of the freeholders' court baron (*i*); and indeed the hundred court resembled the court baron in all points, except that in point of territory the hundred court was of a greater jurisdiction (*k*).] Like the court baron, and for the same reasons, and by the same acts of the legislature, this court (excepting in the case of the hundred court of Salford (*l*)) is now extinct as a court of justice.

III. *The Sheriff's County Court* was a court incident to the jurisdiction of the sheriff. It never ranked as a court

(*g*) F. N. B. 4, 70; Finch, L. 444, 445; *Robinson* v. *Mainwaring* (1847), 10 Q. B. 274.

(*h*) F. N. B. 18; *Brown* v. *Gill* (1846), 3 D. & L. 823.

(*i*) *Bradley* v. *Carr* (1841), 3 Man. & G. 221.

(*k*) Finch, L. 248; 4 Inst. 267.

(*l*) Now regulated by the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.); *Payne* v. *Hogg*, [1900] 2 Q. B. 43.

of record; though from the earliest times down to the year 1846, it might have held pleas of debt or damages under the value of 40*s.* (*m*), [and, by virtue of a special writ called a *justicies*, it might have entertained all personal actions to any amount, the writ of *justicies* empowering the sheriff, for the sake of dispatch, to do the same justice in his county court, as might otherwise be had at Westminster (*n*). The court had jurisdiction also in many "real" actions], before such actions were abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27). [The freeholders of the county were the judges in the court, and the sheriff was the president only, and the officer who carried the decisions of the court into execution; and it was owing to the attendance of the freeholders, or their supposed attendance, at the sheriff's county court, that fresh Acts of Parliament were wont at the end of every session to be there published, and outlawries proclaimed there, and that all popular elections which the freeholders were to make, as formerly of sheriffs and conservators of the peace, and of coroners, verderers (*o*), and knights of the shire, must have been made *in pleno comitatu*, *i.e.*, in full county court. By the 2 & 3 Edw. VI. (1548), c. 25, the court was never to be adjourned longer than for one lunar month. In those antient times, the sheriff's county court was of great dignity and splendour, the bishop and the ealdorman (or earl), with the principal men of the shire, sitting therein to administer justice, both in lay and ecclesiastical causes (*p*). But its dignity became much impaired when the bishop was prohibited, and the earl neglected, to attend it.] And in modern times, little resort was made to it, even as a court for the recovery of debts or damages; and now its jurisdiction in this respect is wholly superseded by the

(*m*) 4 Inst. 266; *Tinniswood* v. *Pattison* (1846), 3 C. B. 243.

(*n*) Finch, 318; F. N. B. 152; Com. Dig. (C.) 5, 7, 8.

(*o*) *R.* v. *Conyers* (1846), 8 Q. B. 981.

(*p*) Wilkins, *Leg. Anglo-Sax.* LL. Eadg. ch. 5.

creation of the modern county courts to be presently considered (*q*).

IV. *Borough Courts* exist within many cities and boroughs throughout the kingdom, being held by prescription, charter, or Act of Parliament (*r*); and by the

(*q*) There were also certain other inferior courts of *civil* jurisdiction, which are now either expressly abolished or fallen into disuse, that is to say:—(1.) *The Court of Great Sessions in Wales*, which was abolished by the Law Terms Act, 1830. (2.) *The Court of the Marshalsea* (abolished by the County Courts Act, 1849, s. 13), which held pleas of trespass committed within the palace precincts, where one of the parties was of the royal household, and pleas of debt and of assumpsit where both parties were of that establishment. (3.) *The Palace Court* at Westminster (abolished by the same Act, s. 13), which held pleas of all personal actions arising within twelve miles of the palace at Whitehall. (4.) *The Court of Piedpoudre* (*curia pedis pulverizati*), so called from the dusty feet of the suitors frequenting the same; which is a court of record incident, by the common law, to every fair or market. Of this court the steward of the owner of the market was the judge; with power to administer justice for all commercial injuries, in that very fair or market, and not in any preceding one (3 Bl. Com. pp. 33, 34; Bac. Ab. *Court of Piepoudre*; Com. Dig. *Market* (G.)). There still exists a court of *Pie Poudre* at Bristol. (5.) *The Forest Courts*, for the government of the royal forests in different parts of the kingdom, and for the punishment of all injuries done to the venison or deer, to the vert or greensward, and to the covert in which the deer are lodged (3 Bl. Com. p. 71; Com. Dig. *Chase*, R. 1, 2; Bac. Ab. *Courts, Courts of the Forest*; *R.* v. *Conyers* (1846), 8 Q. B. 981). (6.) *The Court of Policies of Assurance*, a court established by the 43 Eliz. (1601), c. 12, and 14 Car. 2 (1662), c. 23, for determining in a summary way, under commission from the Lord Chancellor, all causes concerning policies of assurance in London (3 Bl. Com. p. 75). But all questions concerning such policies are now determined in the High Court; and the statutes of Eliz. and Charles have been repealed by the Statute Law Revision Act, 1863. There is also a court for the *Cinque Ports*, but the (ordinary) civil jurisdiction of the court has now been abolished (Cinque Ports Acts, 1855 and 1857).

(*r*) The chief of these within the *City of London* are (1) The *Court of Hustings*, a tribunal analogous to the sheriff's county court; (2) the *Mayor's Court* (*not* the *Lord* Mayor's Court, as it is sometimes erroneously called); as to which see *Mayor of London* v. *Cox* (1867), L. R. 2 H. L. 239; *Davies* v. *MacHenry* (1867), L. R. 3 Ch. App. 200; *Davis* v. *Flag-*

Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), re-enacting a similar provision in the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76), in those boroughs to which that Act extends, and in which there is a separate court of quarter sessions, the recorder is in the general case constituted, by virtue of his office, the judge of the borough court. And the same Act regulates also the jurisdiction of the court, and the qualification and summoning of the jurors therein (*s*). The County Courts Act, 1852 (15 & 16 Vict. c. 54), sect. 7, contains provisions enabling the council of any borough, or the ratepayers of any parish, within the limits of which there is any local court other than a county court, to petition the Crown for the exclusion from such local court of all causes whereof the county court of the district has cognizance ; a provision re-enacted by the County Courts Act, 1888, s. 7. And this last statute also provides that, where any action which could have been brought in a county court, is brought in some other inferior court, and the verdict recovered is less than 10*l*., the plaintiff shall have no more costs from the defendant than if the proceeding were in the county court ; unless the judge of the inferior court shall certify that the action was properly brought in his court. As the result of these provisions, borough courts have, in most cases, ceased to exist.

On the other hand, some of the borough courts having been found to work usefully and to be worth preserving, it was enacted by the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), that in all cases of final judgment for debt or damage not exceeding twenty pounds

staff Mining Co. (1878), 3 C. P. D. 228 ; *Paine* v. *Slater* (1883), 11 Q. B. D. 120 ; *Alderton* v. *Archer* (1884), 14 Q. B. D. 1 ; and the statute 20 & 21 Vict. c. clvii., by which the practice and procedure of this court were amended and its powers enlarged ; also the Mayor's Court of London, Rules, 1892 ; and (3) the *City of London* (formerly called the *Sheriff's*) *Court*, which is now a county court. (See County Courts Act, 1888, s. 185.)

(*s*) Sects. 162—169.

(exclusive of costs), obtained in any borough court, that court might send a writ or precept for the recovery of the same to the registrar of the county court within the jurisdiction of which the defendant had any goods or chattels, and the writ or precept was thereupon to be executed by the high bailiff of the county court, and to be returned to the bailiff or serjeant at mace of the local court (*t*). The Act contained also provisions enabling the judge to appoint a deputy or assistant judge, being a barrister of not less than seven years' standing (*u*); and otherwise provided for the greater efficiency of the court (*x*), and for securing due regularity in its proceedings. There was also contained, in the schedule to the Act, a series of minute provisions having reference to the procedure of the court, including the statement of special cases for the opinion of the High Court of Justice, and providing for the removal of judgments or orders for not less than twenty pounds (exclusive of costs) into the High Court, to be there executed, and for the settlement by the judge (subject to the approval of two judges of the High Court) of the fees to be taken by the bailiff, the registrar, and other officers of the court. All these provisions are still in force in borough courts; and by the Statute Law Revision and Civil Procedure Act, 1883, in extension of the like provision as to county courts which is contained in the Supreme Court of Judicature Act, 1881, s. 27, the king may from time to time (by Order in Council) extend to *any* inferior court of civil jurisdiction,—and therefore to any borough court,—any of the provisions of the Judicature Act, 1873, and of the Acts amending that Act. And the Judicature Act, 1884 (47 & 48 Vict. c. 61), has provided more effectually for bringing about a uniformity of procedure in all inferior courts, and for ensuring the conformity, more or less, of the rules of practice therein to the rules of

(*t*) Sect. 6. (And see 45 & 46 Vict. c. 31.)
(*u*) Sect. 7.
(*x*) Sect. 4.

the Supreme Court. All appeals from borough and other local courts are to a divisional court of the High Court of Justice (*y*).

V. *The Courts of the Commissioners of Sewers.*—These tribunals were originally erected by virtue of a commission under the great seal pursuant to the Statute of Sewers (23 Hen. VIII. (1531), c. 5) ; which statute was subsequently amended by the 13 Eliz. (1571), c. 9, and (in more recent years) by the Sewers Acts, 1833, 1841, and 1849 (*z*). Under these statutes, the powers of the Commissioners are confined to such county or particular place as the commission names ; and their jurisdiction extends to overlooking the repairs of the banks and walls as well of the sea-coast as of navigable rivers, and, with the consent of a certain proportion of the owners and occupiers, to the making of new embankments, as well as to the cleansing of all navigable rivers and of the streams communicating therewith. The city of London has a separate Commission of Sewers under the 7 Anne (1708), c. 9 ; and there are also special statutes regulating the sewers in the metropolis (*a*).

[The commissioners of sewers are a court of record, and consequently may fine and imprison for contempt (*b*) ; and in the execution of their duty, they may proceed either by jury, or upon their own view. They may take order for the removal of any annoyances, or for the safeguard and conservation of the sewers within their

(*y*) Judicature Act, 1873, s. 45 ; Judicature Act, 1884, s. 23 ; Rules of the Supreme Court, 1883, Ord. LIX. r. 1 ; also, rr. 9 to 17 Dec. 1885 ; and Judicature Act, 1894, s. 1, sub-s. (5) ; *Darlow* v. *Shuttleworth*, [1902] 1 K. B. 721.

(*z*) *Emmerson* v. *Saltmarshe* (1837), 7 A. & E. 266 ; *Taylor* v. *Loft* (1853), 8 Exch. 269 ; *The Queen* v. *Baker* (1867), L. R. 2 Q. B. 621.

(*a*) Metropolis Management Act, 1855, ss. 146—148 ; Amendment Acts, 1858, s. 1 ; 1862, ss. 1, 2—6, 22, 44—57, 59, 61, 66, 68, 69 ; Metropolitan Board of Works (Loans) Act, 1869 ; Local Government Act, 1888.

(*b*) *Inhabitants of Oldbery* v. *Stafford* (1663), Sid. 145.

[commission, either according to the laws and customs of Romney-marsh, or otherwise at their own discretion (*c*). They may also assess such rates, or scots, upon the owners of lands within their district as they shall judge necessary; and, in case of refusal to pay, they may levy the same by distress of the goods and chattels, or by sale of the lands of such owners (*d*).]

By the Land Drainage Act, 1861, an Act passed chiefly with reference to the drainage of land for agricultural purposes, provision has been made for the constitution, with the consent of the Board of Agriculture, of *elective drainage districts* throughout the country, and for vesting all matters of drainage within each district in a board having the same powers as the commissioners of sewers, but so that no such district be made within the limits of any commission of sewers, or of any borough or district under a local board of health, or improvement commissioners, without the consent of the commissioners, council, or board, as the case may be (*e*). And it is made lawful for his Majesty, upon the recommendation of the Board of Agriculture, to direct commissions of sewers into all parts of England, *inland* as well as maritime, and to assign as the limits for their jurisdiction any areas which, having regard to facilities for draining, may be thought the most expedient; and it is enacted, that the powers of the commissioners shall extend not only to the maintenance and improvement of existing works with reference chiefly to

(*c*) Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain antient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of King Henry the Third. (4 Inst. 276.) Cf. *New Romney (Mayor, etc.)* v. *New Romney Commissioners*, [1892] 1 Q. B. 840.

(*d*) 23 Hen. 8 (1531), c. 5; Sewers Acts, 1833, 1841, 1849, ss. 2, 7; *Griffiths* v. *Longdon Drainage Board* (1871), L. R. 6 Q. B. 738; *R.* v. *Commissioners for Essex* (1885), 14 Q. B. D. 561; *R.* v. *Selby Dam Drainage Commissioners* (1892), 61 L. J. Q. B. 372.

(*e*) Land Drainage Act, 1861, s. 63; Public Health Act, 1875, s. 327.

sewers and other *watercourses*, outfalls, and defences against water (*f*), but also to the construction of new works. But where land requires to be purchased for new works otherwise than by agreement with the owner thereof, the commissioners must obtain the sanction of parliament (*g*); and other provisions are made for ensuring due compensation to owners whose property is interfered with for the purposes of the Act (*h*). Finally, by the Brine Pumping (Compensation for Subsidence) Act, 1891 (54 & 55 Vict. c. 40), a board of commissioners has been incorporated, for every compensation district to be formed under the provisions of that Act, for the purpose of awarding compensation for subsidence damage to lands and buildings occasioned by the withdrawal of the support of the brine thereto; and the commissioners have certain of the powers of a court, and may also levy rates for providing the compensation awarded, the whole administration of the Act being, however, placed under the control of the Local Government Board.

The Commissioners of Sewers, although a court of great antiquity and invested with an extensive and somewhat arbitrary jurisdiction, is yet but an inferior court, and as such is amenable to the superior guidance of the King's Bench Division of the High Court of Justice (*i*); although at one time it was contended that it was subject only to the king in council.

VI. *The County Courts.*—The disuse into which the contentious jurisdiction of the sheriff's county court gradually fell, was chiefly owing to the dilatory and expensive character of its proceedings, as applied to the

(*f*) *Watercourse* in this Act includes "all rivers, streams, "drains, sewers, and passages "through which water flows." (Sect. 3.)

(*g*) Land Drainage Act, 1861, ss. 22—26.

(*h*) Sects. 18 *et seq.*

(*i*) *Smith's Case* (1670), 1 Ventr. 66; *The Case of Cardiff Bridge* (1700), 1 Salk. 146; *Hetley* v. *Boyer* (1613), Cro. Jac. 336; Judicature Act, 1873, s. 45.

recovery of demands of small amount; and as the remedy afforded by the superior courts was, in this respect, still more objectionable, this state of things gave rise, long ago, to the formation of courts *of request* or *of conscience* (as they were indifferently called) in various parts of the kingdom. But these local courts proving in their turn inadequate to the purpose, chiefly because their jurisdiction was confined to sums of too trivial an amount, and extended only to particular places and to small districts (*k*), therefore, in the year 1846, by the County Courts Act, 1846 (9 & 10 Vict. c. 95), the modern county court was established; and the jurisdiction originally conferred on this new tribunal has been since largely increased, and is still increasing, in a variety of directions. Of the jurisdiction thus established, and of the statutes subsequently passed for its extension, a short account will here be given (*l*), it being premised that all the County Court Acts prior to 1888 have now been consolidated in the County Courts Act, 1888 (51 & 52 Vict. c. 43).

The Act of 1846 directed that these new courts should be established in such counties as her late Majesty in council should think fit (*m*); and by an Order in Council of the 9th March, 1847, and by authority of the Lord Chancellor under a subsequent Act (*n*), a certain number of county court *districts* have been appointed. In some

(*k*) The several courts of *conscience* or of *request* in existence at the date of the 9 & 10 Vict. c. 95, were (in effect) abolished (subject only to a few exceptions) by that statute, and the Order in Council, 1847, which was subsequently issued under its authority.

(*l*) The amending Acts were repealed by the County Courts Act, 1888 (51 & 52 Vict. c. 43). There are also the following Acts still unrepealed, namely, the 31 & 32 Vict. (1868), c. 71, and 32 & 33 Vict. (1869), c. 51 (conferring jurisdiction in Admiralty); the 36 & 37 Vict. (1873), c. 52 (small intestacies); and the 45 & 46 Vict. c. 31 (the Inferior Courts Judgments Extension Act, 1882).

(*m*) Sect. 1. The courts of the universities of Oxford and Cambridge (hereinafter dealt with) were exempted from the Act; and this exemption is continued by the Act of 1888, s. 176.

(*n*) 21 & 22 Vict. c. 74 (County Courts Act, 1858).

convenient place or places in each of the districts so appointed (*o*), the court for that county is held once in every calendar month, or oftener as may be required (*p*); and the county court is constituted a court of record (*q*). The county court districts are grouped in unequal numbers in a variety of circuits (*r*); and to each circuit is assigned a judge, chosen by the Lord Chancellor from amongst the king's counsel, and barristers-at-law of seven years' standing and upwards (*s*). And for each district, there is a registrar (*t*), with clerks and subordinate officers, including a high bailiff and assistant bailiffs (*u*).

Such being the general constitution of the County Courts, we shall now proceed to consider the practice thereof and the procedure therein, although very concisely; referring the student and practitioner for fuller details to the provisions contained in the County Courts Act, 1888, and to the rules of 1889 made thereunder (*x*).

And first, as regards the choice of the court in which the plaintiff is to sue, or bring his plaint, it is provided, that the plaintiff may enter his claim in the county court within the district of which the defendant shall dwell or carry on business at the time of bringing the action (*y*),

(*o*) Act of 1846, s. 2; Act of 1888, s. 10.

(*p*) In some of the smaller districts, the court is held only once in every two or every three months; while in other districts, the court sits at several times during the month, according to the exigency of business.

(*q*) Act of 1888, s. 5.

(*r*) For the circuit which includes the district of Liverpool, there are two judges.

(*s*) The judge is allowed to appoint a deputy (being a barrister of seven years' standing) in case of his own illness or unavoidable absence. (Act of 1888, s. 18.)

(*t*) The registrar (who must be a solicitor of five years' standing) is appointed by the judge, subject to the approval of the Lord Chancellor; and a deputy registrar may (subject to the approval of the judge) be appointed by the registrar (*ibid.*, ss. 25, 29, 31).

(*u*) *Ibid.*, ss. 33—37.

(*x*) The Rules of 1889 have been variously altered and amended by further County Court Rules.

(*y*) As to the *metropolitan* districts, see Act of 1888, s. 84.

or (by leave of the judge or registrar, to be granted or not at his discretion) in the county court within the district of which the defendant shall have dwelt or carried on business within the six calendar months next preceding, or (by the like leave) in the county court within the district of which the cause of action wholly or in part arose, without regard to the place of residence or business of the defendant (*z*). But as regards actions relating to mortgages on lands, and to the partition of lands, the court is to be that of the district within which the lands are situate (*a*); and as regards actions relating to the administration of the estates of deceased persons, the court is to be either that of the domicile of the deceased or that of the district in which his executors or administrators reside (*a*). Proceedings under the Trustee Acts, 1893, 1894, are to be taken in the court within the district of which the persons making the application reside; while in partnership matters they are to be taken in the district where the partnership business was or is carried on. But, in any of the above cases, the court has power to transfer the action or proceedings; if it is shown that the same could be more conveniently heard in some other court.

Secondly, as regards the kinds and classes of action which may be brought in the county courts, the jurisdiction conferred on these courts is, primarily and principally, for the recovery of small debts and demands; and such jurisdiction includes generally all personal actions where the debt, damage, or demand claimed is not more than 50*l.*, whether on balance of account or otherwise (*b*). But if the plaintiff's claim exceeds 20*l.* in an action on any

(*z*) Act of 1888, s. 74; *R.* v. *Turner*, [1897] 1 Q. B. 445; *Northey Stone Co.* v. *Gidney*, [1894] 1 Q. B. 99.

(*a*) *Ibid.* s. 75.

(*b*) *Ibid.* ss. 56, 57. As to the action of *replevin*, see ss. 133—137; and as to the recovery of small tenements, see s. 138 (where term expired or duly determined by notice to quit), and ss. 139—143 (where action is for non-payment of rent).

contract, or 10*l.* in any action of tort, the defendant may object to the county court dealing with the action ; and in such a case, on his giving the prescribed security and obtaining the judge's certificate that some important question of law or of fact is likely to arise, he may have a stay of the proceedings in the county court (*c*). Actions for recovery of the possession of land may also, in certain cases, be brought in the county court, that is to say, where neither the value nor the rent of the tenement exceeds 50*l.* by the year, although in this case the defendant may remove the action into the High Court, under an order of the High Court to be obtained by him for the purpose, on the ground that the title to lands of greater annual value than 50*l.* will be affected by the decision (*d*). And besides these actions for the *recovery* of land, the county court has jurisdiction to make orders for the giving up of the *possession* of land, that is to say, in actions for the recovery of possession, brought by landlords, where neither the value nor the rent of the premises exceeds 50*l.* by the year. But the jurisdiction in the latter action only exists in two classes of cases, that is to say,—(1) Where the tenancy has either expired or has determined by notice to quit, and the tenant, or any person holding or claiming by, through, or under him, neglects or refuses to give up possession ; and (2) Where the rent is one-half year in arrear, and the landlord has a right by law to re-enter for the non-payment thereof (*e*). Actions in which the title to any corporeal or incorporeal hereditament comes in question, may (subject to the same limit of 50*l.*) be tried in the county court (*f*) ; and in any

(*c*) Act of 1888, s. 62.

(*d*) *Ibid.* s. 59. See *Brown* v. *Cocking* (1868), L. R. 3 Q. B. 672 ; *Tomkins* v. *Jones* (1889), 22 Q. B. D. 599 ; *Howorth* v. *Sutcliffe*, [1895] 2 Q. B. 358 ; *Bassano* v. *Bradley*, [1896] 1 Q. B. 645.

(*e*) Act of 1888, ss. 138, 139, and Order V., r. 3,

(*f*) Act of 1888, s. 60. *Bassano* v. *Bradley*, [1896] 1 Q. B. 645.

action in which the title to any corporeal or incorporeal hereditament, or to any *toll*, *fair*, *market*, or *franchise*, comes incidentally in question, if in such a case both parties consent, the judge may decide the claim which is the principal or immediate object of the action. But if he does so, then the decision on the incidental question of title is not to be evidence of title in any other action (*g*). Save as aforesaid, the county court has no jurisdiction (except by consent) in actions for recovery of land, or in actions involving title to corporeal or incorporeal hereditaments (*h*). The county court has also no original jurisdiction in actions for libel, slander, seduction, or breach of promise of marriage (*i*); and no action may be brought in the county court on any judgment of the High Court (*k*). But if both the parties agree *in writing* to give the county court jurisdiction, the agreement being signed either by them or by their solicitors, the county court has jurisdiction, in all common law actions whatsoever (*l*); and, in dismissing an action for want of jurisdiction, it may award costs (*m*).

By the County Courts Act, 1888, s. 66, the defendant in any action in the High Court for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other tort, may, upon affidavit that the plaintiff has no visible means to pay the costs of the action, obtain an order of the High Court removing the action into the county court, unless the plaintiff gives security for the costs of the action, or satisfies the judge (*n*) of the High Court that the action is one proper to be tried in the High Court (*o*).

(*g*) Act of 1888, s. 61.

(*h*) *Tomkins* v. *Jones* (1889), 22 Q. B. D. 599.

(*i*) *Ibid.* s. 56.

(*k*) *Ibid.* s. 63.

(*l*) *Ibid.* s. 64; *Wadsworth* v. *Queen of Spain* (1851), 20 L. J. Q. B. 493; *Foster* v. *Usherwood* (1877), 3 Ex. D. 1.

(*m*) Act of 1888, s. 114.

(*n*) The application to remit the action to the county court is made to a master at chambers.

(*o*) *Craven* v. *Smith* (1869), L. R. 4 Ex. 146; *Grey* v. *Wish* (1869), L. R. 4 Q. B. 175; *Levi* v. *Sanderson*, *ib.* 330; *Sampson* v. *Mackay*, *ib.* 643.

In order to utilize more fully the county courts in cases proper to be there tried, it is provided, that in any action *of contract*, brought in the High Court, wherein the claim endorsed on the writ does not exceed 100*l.* (*p*), or where such claim, though it originally exceeded that amount, is reduced by payment (*q*), an admitted set-off, or otherwise, to a sum not exceeding that amount, a judge (*n*) of the High Court may, on the application of either party at any time, order the action to be tried in any county court (*r*) ; and, in fact, unless there is good cause to the contrary, the judge (*n*) is required to make such order (*s*). Actions of contract and of tort, which have been thus remitted from the High Court to the county court, remain in the High Court until the plaintiff has lodged with the registrar of the county court the order, the writ, copies of the affidavits on which the order was made, and a statement of the names and addresses of the parties and their solicitors, and particulars of claim. Until this has been done, the action remains in the High Court ; but, when once this has been done, the remitted action becomes a county court action, and the jurisdiction of the High Court ceases absolutely (*t*). With the same view, and in order also to penalize persons who bring actions in the High Court which are proper to be tried in the county court, it has been further provided, that, if in any action in the High Court the plaintiff shall recover a sum less than 20*l.*, when the action is founded on contract, or 10*l.* when it is founded on tort, he shall not be entitled to any costs of the action ; and if he recover a sum of 20*l.*, but less than 50*l.* (on contract), or a sum of 10*l.*, but less than 20*l.* (on tort), he shall be entitled only

(*p*) *Bassett* v. *Tony*, [1894] 2 Q. B. 332.

(*q*) Which means payment before the action is commenced (*Hodgson* v. *Bell* (1890), 24 Q. B. D. 525 ; cf. *Dierken* v. *Philpot*, [1901] 2 K. B. 380).

(*r*) *Burkill* v. *Thomas*, [1892] 1 Q. B. 99, 312.

(*s*) Act of 1888, s. 65. See *Scutt* v. *Freeman* (1877), 2 Q. B. D. 177 ; *Curtis* v. *Storin* (1889), 22 Q. B. D. 513.

(*t*) *D'Errico* v. *Samuel* (No. 1), [1896] 1 Q. B. 163 ; *Duke* v. *Davis*, [1893] 2 Q. B. 260.

to county court costs of action, unless the judge certifies that there was sufficient reason for bringing the action in the High Court, or unless the Court or a judge at chambers shall, by order, allow such costs (*u*). But if in such a case, when the action is founded on contract, the plaintiff within twenty-one days after the service of the writ obtains an order under Order XIV. rule 1 (*v*), to enter up judgment for a sum of 20*l.* or upwards, he is to be entitled to his costs according to the scale for the time being in use in the High Court. By the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 17, interpleader proceedings in the High Court, when the amount or value of the matter in dispute does not exceed 500*l.*, may, at the discretion of the judge of the High Court, be transferred into the county court; and the transfer is to have the same effect as a transfer under section 69 of the County Courts Act, 1888, which (as hereafter more particularly mentioned) provides for the transfer of certain classes of equitable actions from the High Court into the county court. And in order still further to encourage the prosecution of actions in the county court, it is provided, by section 119 of the County Courts Act, 1888, that the judge of that court may in any proper case, and irrespectively of the amount recovered, award costs on a higher scale than that which would otherwise be applicable, provided he certify that the action involved a novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or was of general or public interest.

Regarding the mode of proceeding in the county courts, while referring the reader to the rules themselves regula-

(*u*) Act of 1888, s. 116. By one of the High Court rules (Order LXV. r. 12) the plaintiff only gets costs on the county court scale if in an action of contract he recovers a sum *not exceeding* 50*l.*, unless the court or a judge otherwise orders. The rule applies where he recovers exactly 50*l.* (*Millington* v. *Harwood*, [1892] 2 Q. B. 166).

(*v*) As to which, see, *post*, book v., ch. x.

tive of that practice, we may here give the following brief outline of the procedure. The first step in the proceedings is to enter a *plaint* in a book kept by the registrar for the purpose (*x*); and thereupon a *summons* is issued and served on the defendant. On the day in that behalf named in the summons, the plaintiff appears to support his claim, and the defendant appears to make his defence; or, if the defendant fail to appear, the plaintiff, on proving his case in court, has judgment. If the plaintiff should (by leave in that behalf) have issued what is called a *default summons*, then, unless the defendant gives notice of defence, the plaintiff, at the end of eight days from the time of service, may sign judgment without further proof (*y*). The defendant, assuming that he has any special defence, must (if he intends to rely upon it) give notice of it; that is to say, if he intends to set off or set up by way of counterclaim any debt or demand, or to set up by way of defence the fact of infancy, coverture, the statute of limitations, or discharge in bankruptcy, or any statutory defence (*z*). On the case being called, the judge proceeds to try it, and gives judgment upon such evidence, taken *vivâ voce* and upon oath, as the parties on either side shall adduce; it being provided, that the judge, at the hearing, shall himself determine all questions, as well of fact as of law, unless a jury shall be summoned (*a*). When the amount claimed exceeds 5*l*., either side may require a jury to be summoned; and even where it does not exceed 5*l*., a jury may be summoned at the discretion of the judge, on the application of either of the parties (*b*). A county court

(*x*) Act of 1888, s. 73.

(*y*) *Ibid.* s. 86.

(*z*) *Ibid.* s. 82. See *Brutton* v. *Branson*, [1898] 2 Q. B. 219 (Statute of Frauds); *Willis* v. *Lorick*, [1901] 2 K. B. 195 (Gaming Act).

(*a*) *Ibid.* s. 79. In most county courts the defendant's counsel or advocate is only allowed one speech, instead of two as in the High Court; but some, though not all, judges will allow the speech to be made before *or* after the defendant's evidence has been given, as the counsel or advocate chooses.

(*b*) *Ibid.* s. 101.

jury, in either case, consists of five persons qualified to serve as jurors at the trial of issues of fact arising in actions pending in the High Court of Justice; and the jury must be unanimous in their verdict (*c*).

When the judge at such hearing adjudges a sum of money to be paid by one party to the other by instalments or otherwise, and the order for payment is not complied with, execution may issue against the goods of the judgment debtor (*d*). Under the Debtors Act, 1869 (32 & 33 Vict. c. 62), if such debtor has the means to pay at the date of the judgment, or at any time afterwards, and fails to do so, he may, on his ability to pay being established to the satisfaction of the county court judge, be committed to prison for any period not exceeding six weeks, though he may obtain his liberty at any time by paying the sum ordered. The mode of proceeding to obtain his committal is to issue a *judgment summons*, requiring him to show cause why he does not pay the sum for which the judgment was obtained; or if such sum was ordered to be paid by instalments, why he does not pay the instalments. And, on the hearing of the *judgment summons*, a new order may be made as to the mode of payment of the sum for which the judgment was obtained, if the judge shall think fit to vary his original order; but no second commitment can be made in respect of the same default (*e*). And by the County Courts Act, 1888, s. 153, for inability to pay the judgment, or any instalment, when such inability arises from sickness or other sufficient cause, the judge may suspend the judgment, and may even discharge the debtor. A committal order can only be made by a judge or his deputy (*f*).

This jurisdiction of the county court under the Debtors Act, 1869, now extends also to enforcing any judgment,

(*c*) Act of 1888, s. 102.

(*d*) *Ibid.* s. 146.

(*e*) *Evans* v. *Wills* (1876), 1 C. P. D. 229.

(*f*) Debtors Act, 1869, s. 5; (1878), 41 & 42 Vict. c. 54.

whether of the High Court, or of the county court in which proceedings to enforce it are taken, or of any other county court, or of any inferior court, and whatever may be the amount of the judgment (*g*). Upon the application to commit, the court may, however, decline to commit, and may, with the consent of the judgment creditor, make a receiving order against the debtor ; or, if it appears to the court that the liabilities of the debtor do not exceed 50*l*., the court may make an administration order under section 122 of the Bankruptcy Act, 1883, in lieu of a receiving order.

The execution of the judgment of one county court, against a debtor within the district of another county court in England, may be effectuated by such other court, provided it have received and duly sealed with its own seal, the warrant (duly attested) of the first county court to proceed to such execution (*h*). And if a judge of the High Court is satisfied that the debtor has no *goods or chattels* convenient to satisfy the judgment obtained in the county court, he may order a writ of *certiorari* to issue for the removal of the judgment into the High Court, for the purposes of execution against the *lands* of the debtor or otherwise (*i*). By the Inferior Courts (Judgments Extension) Act, 1882 (45 & 46 Vict. c. 31), the judgment of a county court in England may also be executed in any other part of the United Kingdom by the corresponding court in such other place, provided a certificate of the judgment be first registered in such other corresponding court.

It is competent to the judge, after having given his decision, to accede, if he so think fit, to an application for a new trial (*i.e.*, to have the action tried again) upon such terms as he thinks reasonable (*k*) ; and in the meantime to stay the proceedings. But the judge can only grant a new trial on grounds which would in the High Court

(*g*) Bankruptcy Act, 1883, s. 103 (4).
(*h*) Act of 1888, s. 158.
(*i*) *Ibid.* s. 151.
(*k*) *Ibid.* s. 93.

be deemed sufficient for granting it (*l*). No appeal lies from the finding of any *fact* by the judge (*m*); but if either party to the action is dissatisfied with the determination or direction of the judge in point of *law* or *equity*, or upon the admission or rejection of any *evidence*, the party dissatisfied may, if the point of law has been taken before the county court judge, and not otherwise (*n*), appeal to the High Court (*o*), in such mode as is for the time being provided in that behalf by the Rules of the High Court of Justice (*p*). The appeal is to a divisional court of the King's Bench Division (*q*), and is made by notice of motion. No appeal will lie, if both parties have agreed in writing, before the decision is pronounced, that the decision of the judge shall be final (*r*); and there is in no case (unless by special leave of the judge) any right of appeal, in an action of contract or tort (other than in ejectment or in actions involving title to land), where the debt or damage claimed does not exceed 20*l*., nor in any action of replevin, where the amount of the rent or the value of the goods does not exceed 20*l*., nor in any action for the recovery of tenements, where the yearly rent or value does not exceed 20*l*., nor in interpleader proceedings, where the money claimed or the value of the goods does not exceed 20*l*. (*s*).

The scope of the county courts was at first confined,

(*l*) *Murtagh* v. *Barry* (1890), 24 Q. B. D. 632.

(*m*) *Cousins* v. *Lombard Bank* (1876), 1 Ex. D. 404.

(*n*) *Wohlgemuthe* v. *Coste*, [1899] 1 Q. B. 501; *Cook* v. *Gordon* (1892), 61 L. J. Q. B. 445.

(*o*) *Warner* v. *Riddiford* (1858), 4 C. B. (N.S.) 180; *Carr* v. *Stringer* (1858), E. B. & E. 123; *Stone* v. *Dean*, *ib.* 504; *Waterton* v. *Baker* (1868), L. R. 3 Q. B. 173; *Gage* v. *Collins* (1867), L. R. 2 C. P. 381; *Francis* v. *Dowdeswell* (1874), L. R. 9 C. P. 423; *Turner* v. *Great Western Rail. Co.* (1877), 2 Q. B. D. 125; *Mayer* v. *Farmer* (1878), 3 Ex. D. 235.

(*p*) Act of 1888, s. 120.

(*q*) Judicature Act, 1873, s. 45; Rules of Supreme Court, 1883, Order LIX. rules 4—8; and the further rules 9 to 17, issued in December, 1885; Act of 1888, ss. 121, 122.

(*r*) *Ibid.* s. 123.

(*s*) *Ibid.* s. 120.

with regard to their ordinary and litigious jurisdiction, to such matters as could be concurrently brought in one of the superior courts in which law was administered, as distinct from equity ; but as the convenience of the county courts became more appreciated, the opinion gained ground, that it would be desirable to confer on them a jurisdiction also in cases involving questions of *equity* where comparatively small interests were concerned, and which would otherwise have to be entertained, if at all, through the expensive and dilatory method of chancery proceedings. For this purpose, there was passed, in the year 1865, the 28 & 29 Vict. c. 99, entitled "An Act to confer on the County Courts a limited Jurisdiction in Equity." That statute has since been repealed, and its provisions (with certain amendments) re-enacted by the County Courts Act, 1888 ; under which last-mentioned Act (*t*), the county court has now (concurrently with the High Court) (*u*), all the powers and authority of the High Court of Justice itself in the following matters of equity, that is to say :— (1.) Administration suits, wherein the estate does not exceed in value the sum of 500*l.* (*x*) ; (2.) Suits for the execution of trusts, where the estate or fund does not exceed the same amount (*y*) ; (3.) Foreclosure and redemption suits, and suits for enforcing any charge or lien, where the mortgage, charge, or lien shall be within such limit ; (4.) Suits for the specific performance or for the rectification of agreements, where the property sold or leased does not exceed that amount in value (*z*) ; (5.) Proceedings under the Trustee Act, 1893, with a similar qualification as to the value of the property ; (6.) Proceedings as to the maintenance or advancement of infants, with a similar qualification ; (7.) Suits for the dissolution

(*t*) Sect. 67.

(*u*) *Brown* v. *Rye* (1874), L. R. 17 Eq. 343.

(*x*) *Turner* v. *Rennoldson* (1873), L. R. 16 Eq. 37.

(*y*) *Clayton* v. *Renton* (1867), L. R. 4 Eq. 158.

(*z*) *Wilcox* v. *Marshall* (1867), L. R. 3 Eq. 270.

or winding-up of partnerships, the assets not exceeding such amount; and (8.) Actions for relief against fraud or mistake, in which the damage sustained, or the estate or fund in respect of which relief is sought, does not exceed 500*l*. (*a*). Also, by section 69 of the County Courts Act, 1888, the Chancery Division of the High Court may, on the application of any party to the action proceeding therein, or *mero motu*, order a transfer of such action into the county court, provided it be one within the jurisdiction of the county court as above defined; and thereafter the action proceeds in the county court, precisely as if it had been originally commenced therein. And it is provided, by section 68 of the County Courts Act, 1888, that if, during the progress of an action proceeding in the county court on its equitable side, it appears that the limit of that court's jurisdiction is exceeded, the judge of the county court shall transfer the action to the Chancery Division of the High Court. But either party may obtain an order of the Chancery Division directing the continued prosecution of the action in the county court, notwithstanding the excess of the jurisdiction.

In the year 1868, the policy of increasing the jurisdiction of the county courts received a still further development, by conferring upon such of them as are held in the neighbourhood of the sea a limited jurisdiction in admiralty; and this was carried into effect by the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), amended by the County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51) (*b*). By the Admiralty Jurisdiction Act, 1868, it was provided, that the machinery for appointing county courts for admiralty

(*a*) By the Act of 1888, s. 71, any money paid into a county court in equitable proceedings is to be invested by the registrar, within forty-eight hours, in the post-office savings bank of the town.

(*b*) *Hewitt* v. *Cory* (1870), L. R. 5 Q. B. 418.

purposes should be by Orders in Council from time to time as the needs for such courts arose (*e*).

The jurisdiction conferred by the Admiralty Jurisdiction Acts just referred to extends to the following matters of admiralty, that is to say :—

(1.) Salvage.—Any cause in which the value of the property does not exceed 1000*l*., or in which the amount claimed does not exceed 300*l*. (*d*) ; and within these limits, the admiralty jurisdiction of the county court is the same as that of the High Court. The county court has also, within the same limits, jurisdiction under the Merchant Shipping Act, 1894, with reference to salvage for saving life, salvage of cargo or wreck, the determination of salvage disputes, and the apportionment of salvage, in case of dispute, when ascertained (*e*).

(2.) Towage, necessaries or wages.—All claims not exceeding 150*l*. (*f*) ; and subject to that limitation, the jurisdiction is in these matters also the same as that of the High Court.

(3.) Damage to cargo or by collision.—As regards damage to cargo, the county court has jurisdiction over claims not exceeding 300*l*. (*g*). In cases of damage to cargo by collision, proceedings in the county court may be either *in rem* or *in personam*, though in the High Court the jurisdiction is only *in personam* (*h*). And with reference to damage by collision, by the combined effect of the Acts of 1868 (*i*), and 1869 (*k*), the jurisdiction of the county court extends to any claim for damage by collision, and any claim for damage to ships,

(*c*) Such Orders in Council have been made from time to time, and a list of county courts now having admiralty jurisdiction by virtue of such orders will be found at p. 599 of the Yearly County Court Practice for 1903.

(*d*) Act of 1868, s. 3 (1).

(*e*) 57 & 58 Vict. c. 60, ss. 544, 546—549, 556.

(*f*) Act of 1868, s. 3 (2).

(*g*) *Ibid.* s. (3).

(*h*) *The Victoria* (1887), 12 P. D. 105.

(*i*) Act of 1868, s. 3 (3).

(*k*) Act of 1869, s. 4.

whether by collision or otherwise, within the limit of 300*l*. But, of course, no wider jurisdiction over claims for damage by or to ships is thereby conferred than is possessed by the High Court (*l*).

(4.) Claims arising out of agreements in relation to the use or hire of any ship, or to the carriage of goods therein or out of any tort in relation to such goods, not exceeding 300*l*. (*m*).

(5.) Jurisdiction by agreement.—By agreement, a county court has jurisdiction over any of the above matters where the value of the property saved or amount claimed is beyond the prescribed limit, if the parties agree, by a memorandum signed by them or by their solicitors or agents, that any county court having admiralty jurisdiction, and specified in the memorandum, shall have jurisdiction (*n*).

But the jurisdiction of the county courts in admiralty matters is not to extend to any prize cause, or to any other matter within the Naval Prize Act, 1864, or to any matter arising under the Acts for the suppression of the slave trade; and it does not, in general, extend to any admiralty jurisdiction by way of appeal (*o*),—although, now, a limited appellate jurisdiction has been conferred upon county courts by the Merchant Shipping Act of 1894, as courts of survey (*p*) and as courts of appeal from pilotage authorities (*q*).

No county court, other than the county court appointed to have admiralty jurisdiction within any district, has jurisdiction in an admiralty cause within that

(*l*) *The Zeta*, [1893] A. C. 468; *R. v. City of London Court*, [1892] 1 Q. B. 273.

(*m*) Act of 1869, s. 2 (1); *Pugsley* v. *Ropkins*, [1892] 2 Q. B. 184.

(*n*) Act of 1868, s. 3; Act of 1869, s. 2 (2).

(*o*) Act of 1868, s. 4.

(*p*) Merchant Shipping Act, 1894, ss. 271, 275, 487, 488.

(*q*) Sect. 610. And see further, as to jurisdiction in these matters, the notes to the Merchant Shipping Act, 1894, in vol. ii. of the Yearly County Court Practice, 1903, p. 206.

district (*r*). This rule, however, only applies where it is necessary to resort to the special remedies, and to make use of the special powers, of the Admiralty Jurisdiction Acts of 1868 and 1869; for where there is no such necessity, there is nothing in those Acts which has impaired, or which interferes with, the old county court jurisdiction (*s*).

The Admiralty Jurisdiction Act, 1868, further makes provision in certain contingencies for the transfer of causes between the High Court and county court, and between county courts, in order to facilitate the trial of such causes (*t*).

Special provision is also made as to the district in which admiralty causes shall be commenced (*u*); and certain special provisions as to procedure in such causes have also been laid down by Rules made under the authority of the Admiralty Jurisdiction Act, 1868 (*x*). That Act, however, is to be read as one with the County Courts Act, 1888 (*y*); and the result is, that, where not necessarily excluded by the special procedure in admiralty causes, the ordinary county court practice and procedure apply (*z*).

An admiralty cause in a county court is heard and determined, and the judgment enforced, in the same way as in an ordinary civil action (*a*); but in admiralty causes, there is no right to a jury (*b*). *Nautical* assessors may be had, as of right, in cases relating to salvage,

(*r*) Act of 1868, s. 5.

(*s*) Thus, a county court, not having admiralty jurisdiction, can try (as an action of tort) an action to recover damages for injuries caused by collision between vessels up to the 50*l.* limit (*Scorell* v. *Bevan* (1887), 19 Q. B. D. 428); or can try (as an action of contract) an action to recover freight under a charter-party, within the same limit (*R.* v. *Southend C. C. Judge* (1884), 13 Q. B. D. 142).

(*t*) Sects. 6, 7, and 8.

(*u*) Sect. 21.

(*x*) Sects. 35, 36; and Order 39B of the County Court Rules, 1889, as modified by the Rules of May, 1899.

(*y*) Sect. 34.

(*z*) *The Vulcan*, [1898] P. 222.

(*a*) Act of 1868, ss. 10, 12, 13, 23; and Order 39B, rr. 1—3, 37—39.

(*b*) *The Theodora*, [1897] P. 279; *The Tynwald*, [1895] P. 142.

towage, or collision (*c*) : and in any admiralty or maritime cause the judge may, at the trial, be assisted by two *mercantile* assessors (*d*).

An appeal lies from an admiralty decision of the county court to a divisional court of the Probate, Divorce and Admiralty Division of the High Court (*e*). But the provisions of the Admiralty Jurisdiction Act, 1868, with respect to appeals, must now be read subject to the general provisions of section 120 of the County Courts Act, 1888 (*f*). And the result is, that an appeal lies, without leave, on a point of law, whether final or interlocutory, whatever the amount in question ; but on questions of fact, an appeal lies,—(A) with leave, from a final order, where the amount exceeds 50*l.* ; and (B) with leave, from an interlocutory order, when the amount exceeds 50*l.* Security for costs must in both cases be given (*g*).

The procedure on appeal is by motion (*h*). But, as in an ordinary county court action, an appeal may be precluded by previous agreement in the prescribed form (*i*).

In the year 1869, when the bankruptcy law was remodelled by the Bankruptcy Act, 1869, the administration thereof was by that Act entrusted, except in the district of the London Court of Bankruptcy, to certain of the county courts (*k*) ; and this jurisdiction is continued

(*c*) Act of 1868, ss. 10, 11 ; Order 39B, rr. 58—68, as modified by the County Court Rules of May, 1899.

(*d*) Act of 1869, s. 5.

(*e*) Act of 1868, s. 26 ; and s. 120 of the County Courts Act, 1888. Also Rules Supreme Court, Order LIX. r. 4.

(*f*) *The Eden*, [1892] P. 67 ; *The Delano*, [1895] P. 40.

(*g*) Act of 1868, ss. 26, 31.

(*h*) County Courts Act, 1888, s. 120; Act of 1868, s. 27.

(*i*) Act of 1868, s. 28 ; County Courts Act, 1888, s. 123.

(*k*) By s. 59, the court "having "jurisdiction in bankruptcy" was defined to be (beyond the London bankruptcy district) the county court of the district wherein the debtor resided or carried on his business ; but by s. 79 the Lord Chancellor was enabled, by order, to exclude any county court from having jurisdiction in bankruptcy, and for the purpose of bankruptcy to attach its district to another county court. Districts were appointed by order of January 1st, 1870, and have been maintained, subject to alteration under the Bankruptcy Act, 1883, s. 92.

in the county courts by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*l*). When, in a bankruptcy proceeding in a county court, a question of law arises, it may, at the instance of all parties, or of one party and the judge, be sent to the High Court, in the form of a special case stated by the county court judge for determination in the first instance (*m*).

The registrars of a county court, having jurisdiction in bankruptcy, have had certain powers and jurisdiction in bankruptcy matters conferred upon them, similar to those conferred on registrars in bankruptcy of the High Court; and any order made by them is equivalent to an order of the court (*n*). But provision is made for an adjournment from the registrar to the judge (*o*). For the purposes of its bankruptcy jurisdiction, a county court has all the powers of the High Court (*p*).

Moreover, by virtue of its bankruptcy jurisdiction, a county court has power to decide all questions whatsoever, whether of law or of fact, which may arise in any bankruptcy case, or which the court may deem it expedient to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case (*q*); and, in cases arising out of the bankruptcy, there is no limit to such jurisdiction, though the judge in his discretion should refuse to try cases in which questions of character or large amounts are involved (*r*). But as to questions between the trustee and strangers to the bankruptcy, the jurisdiction is limited to cases in which the amount in dispute does not, in the opinion of the judge, exceed 200*l*., or where all parties consent (*s*).

(*l*) Sects. 92, 100, 102.

(*m*) Sect. 97 (3).

(*n*) Sect. 99. The appeal from a registrar's order is direct to Divisional Court (*Re Mangham*, (1888), 21 Q. B. D. 21).

(*o*) Bankruptcy Rules, 1883–1890, r. 8.

(*p*) Bankruptcy Act, 1883, s. 100.

(*q*) *Ibid.* s. 102 (1).

(*r*) *Re Beswick* (1888), 5 Morr. 105; 58 L. T. 591.

(*s*) Bankruptcy Act, 1883, s. 102 (1); *Re Holt* (1888), 58 L. J. Q. B. 5.

The practice and procedure of the county court in exercising its bankruptcy jurisdiction are regulated by the Bankruptcy Acts, 1883 and 1890, and by the Rules made thereunder.

The appeal from a county court in bankruptcy is to a divisional court, whose decision is final, unless the court gives special leave to appeal to the Court of Appeal (*t*).

A limited jurisdiction has also been given to county courts to wind up companies by the Companies (Winding-up) Act, 1890 (*u*). By that Act, it is provided, that, where the capital of a company paid up, or credited as paid up, does not exceed 10,000*l*., and the registered office of the company is situate within the jurisdiction of a county court having jurisdiction under the Act, a petition to wind up the company, or to continue the winding up of the company under the supervision of the court, shall be presented in that county court (*x*).

The county courts having jurisdiction in the winding up are, broadly speaking, the same as those which have jurisdiction in bankruptcy (*y*); but the Act gives the Lord Chancellor power to add to, exclude, and alter the districts of the courts which are to exercise the winding-up jurisdiction (*z*). For the purposes of the jurisdiction in winding up, the county court has all the powers of the High Court; the practice and procedure followed by the county court in exercising its jurisdiction being, generally, that prescribed by the Companies Acts, 1862 to 1900, and particularly by the Companies (Winding-up) Act, 1890, and by the rules made thereunder. But where no other provision is made by those Acts or rules, the practice is, so far as practicable, in accordance with the existing rules and practice of the county court, in proceedings for the administration of assets (*a*).

(*t*) Bankruptcy Appeals (County Courts) Act, 1884, s. 2, amending s. 104 of the Bankruptcy Act, 1883.

(*u*) 53 & 54 Vict. c. 63.

(*x*) Sect. 1 (3).

(*y*) Sect. 1 (6).

(*z*) Sect. 1 (5).

(*a*) Winding-up Rules, 1890, 178.

By the Stannaries Court Abolition Act, 1896 (*b*), the jurisdiction of the Stannaries Court was transferred to the county courts of Cornwall holden at Truro. Under the Companies (Winding-up) Act, 1890, unlimited jurisdiction to wind up companies working mines within the Stannaries was given to the Stannaries Court, wherever the registered office of the company was situated (*c*) ; and this unlimited jurisdiction is therefore now vested in the county court to which the jurisdiction has been assigned.

Any question arising in a winding-up proceeding in a county court may, at the instance of all parties, or of the judge and one of the parties, be first determined by the High Court on a special case stated by the county court judge (*d*). There is, also, an appeal to the High Court, by motion, under section 120 of the County Courts Act, 1888 (*e*).

Another important branch of the county court jurisdiction is that conferred by the statutes relating to employers and workmen. These Acts are the Employers and Workmen Act, 1875 (*f*), the Employers' Liability Act, 1880 (*g*), the Workmen's Compensation Act, 1897 (*h*), and the Workmen's Compensation Act, 1900 (*i*), the substantive provisions of all which Acts have been elsewhere sufficiently stated in this work. There are specific rules made under each Act regulative of the practice or mode of procedure thereunder ; and where such rules are inapplicable, the ordinary procedure in the county court is available.

In addition to the jurisdictions already mentioned, the county courts exercise under particular statutes a very extensive jurisdiction of a more or less summary character ; and such jurisdiction is being constantly added to. Sometimes the jurisdiction is vested in the county court

(*b*) 59 & 60 Vict. c. 45.

(*c*) Companies (Winding-up) Act, 1890, s. 1 (4).

(*d*) *Ibid.* s. 3 (3).

(*e*) *Re Ilkley Hotel Co.*, [1893] 1 Q. B. 248.

(*f*) 38 & 39 Vict. c. 90.

(*g*) 43 & 44 Vict. c. 42.

(*h*) 60 & 61 Vict. c. 37.

(*i*) 63 & 64 Vict. c. 22, which extends the benefit of the Act to workmen in agriculture.

exclusively of all other courts; and sometimes it is vested in the county courts concurrently with the High Court (and either subject to, or without being subject to, any limit to the jurisdiction); and sometimes it is vested in the county courts concurrently with the justices or the magistrates. It is difficult to classify the many miscellaneous matters which fall within this statutory jurisdiction; but they include:—(1) As regards married women, the decision of questions relative to their separate property, and the protection of their earnings; (2) As regards infants, orders as to their guardianship; (3) As regards lunatics, orders for their reception into asylums (including urgency orders), and also orders as to the application of their property; (4) As regards Friendly Societies, Industrial and Provident Societies, and Building Societies, the determination of disputes generally between members and the respective societies, and as regards nominations by and small intestacies of the members; (5) As regards charities, the hearing and disposal of various applications under the Charitable Trusts Act; also (6) Recovery of penalties under the Pharmacy Acts, Government Annuities Act, 1882, and Hosiery Manufacture (Wages) Act, 1874; (7) Recovery of damages under the Riot Act, 1886, and of the expenses of extraordinary traffic under the Locomotives Act, 1898, s. 12; (8) Recovery of expenses under the Inclosure Act, 1868; (9) Recovery of compensation under the Army Act, for impressment of carriages and vessels; and under the Brine Pumping Act, 1891, for subsidence; and of loans by way of relief under the Poor Law Amendment Acts; (10) The settlement of disputes as regards small estates or intestacies under the Court of Probate Acts, 1857 and 1858; (11) Various applications under the Settled Land Acts and kindred Acts, the Tithe Acts, and the Agricultural Holdings Act and kindred Acts relating to allotments and market gardens; (12) Applications (relative to the public health) under the Factories and Workshops Acts, the Alkali Acts, the Rivers Pollu-

tion Prevention Acts, and the Open Spaces and Commons Acts ; (13) Applications under the Law of Distress Amendment Acts and the Customs Consolidation Act, 1876. And there are also certain duties of a more or less exceptional character imposed upon county court judges personally,—*e.g.*, under the Acts for the regulation of coal and other mines, and for the storage and carriage of explosives, and regarding inebriates or habitual drunkards (*k*).

VII. *The Court of the Stannaries of Cornwall and Devon (now merged in the County Courts of Cornwall).*— The Court of the Stannaries was originally established for the administration of justice among the tinners, within the two counties of Cornwall and Devon. It was a court of record, and [was held before a judge called the vice-warden ; and the jurisdiction of the court was founded on an antient privilege granted to the workers in the tin mines, to sue and be sued in their own court, so that they might not be drawn from their business, to their own private loss and to the public detriment, by attending their lawsuits in other courts (*l*). The privileges of the tinners were confirmed by a charter of the thirty-third year of Edward the First (1305), and were fully expounded in a private statute which is set forth in Coke's Institutes (*m*), and which was afterwards explained by a public Act, namely, the 16 Car. I. (1640), c. 15. There were originally distinct courts for the two counties ; but by later statutes, the two courts were united into one, and their procedure was regulated (*n*). But the court has

(*k*) All the Acts under which the county court has some special jurisdiction or administrative power will be found collected, classified, and annotated in vol. ii. of the Yearly County Court Practice, 1903.

(*l*) 4 Inst. 232.

(*m*) *Ibid.*

(*n*) Especially the Stannaries Act, 1869 (32 & 33 Vict. c. 19), and the Stannaries Act, 1887 (50 & 51 Vict. c. 43) ; and see Carew, *History of Cornwall ;* Doderidge, *History of Cornwall*, p. 94 ; Bainbridge, *Mines*, 4th ed., pp. 146—160, 175—187, 194—199 ; *Rowe* v. *Brenton* (1828), 8 B. & C. 737 ; *Harvey* v. *Gilbard* (1839), 1 W. W. & H. 552.

[now, as we have said, been converted into a county court (*o*), or rather has been merged in the county courts of Cornwall sitting at Truro ; and the procedure has been assimilated (more or less) to the procedure in the county courts, the winding-up jurisdiction being exerciseable only by such of the county courts as have jurisdiction in bankruptcy.

The jurisdiction of the Stannaries Court (or, now, the Stannaries Jurisdiction of the County Courts of Cornwall) may be stated as follows. All tinners and labourers in and about the stannaries, during the time of their working therein *bonâ fide*, may sue and be sued in this court, in all matters arising within the stannaries, excepting pleas of land, life, and member ;] and until the year 1846 (when the modern county courts were established as is hereinbefore mentioned), these persons, as regarded all such matters, were privileged not to be sued in any other court than the stannaries court (*p*). However, since that year, they may, as regards all the same matters (not being matters of equitable jurisdiction) (*q*), be sued either in the stannaries court or in the county court of their district (*r*) ; and as regards causes of action arising outside the stannaries, they might always have been sued either in the stannaries court or elsewhere (*s*).

As regards appeals from the court, these were formerly to the lord warden, assisted by two or more legal assessors ; and there was a final appeal to the judicial committee of the privy council (*t*). But, under the Judicature Acts, the jurisdiction and powers of the court of the lord warden assisted by his assessors, or of the lord warden sitting in

(*o*) Stannaries Court Abolition Act, 1896, Order of Lord Chancellor, dated 16th December, 1896, and General Rules (Stannaries, Jurisdiction of), February, 1897.

(*p*) 4 Inst. 231 ; Com. Dig. *Courts*, L. 1.

(*q*) County Courts Act, 1888, s. 177.

(*r*) *Newton* v. *Nancarrow* (1850), 15 Q. B. 144.

(*s*) 4 Inst. 231,

(*t*) See Stannaries Act, 1855, s. 26.

his capacity of judge, were transferred to and vested in the Court of Appeal of the Supreme Court of Judicature (*u*). Appeals from the Stannaries Jurisdiction of the County Courts of Cornwall are now heard before Divisional Courts of the High Court of Justice.

VIII. *The Ecclesiastical Courts* (*x*).—These courts are inferior courts, but possessing a very special jurisdiction; and both as regards their principles and the practice in them, they are guided for the most part by the rules of the civil and canon laws, though these laws (as was before observed) have no force within this realm, save as admitted or recognised by the municipal law of England. Except where and so far as their jurisdiction is recognised by the municipal law, these courts have, accordingly, no jurisdiction; and if any ecclesiastical tribunal whatever attempts to exceed its proper limits, the High Court of Justice may, and does, prohibit the excess (*y*).

[In the time of our Saxon ancestors, there was no distinction between the lay and the ecclesiastical jurisdictions. The ancient county court was originally as much a spiritual as a temporal tribunal, the rights of the church

(*u*) Judicature Act, 1873, s. 18.

(*x*) This is a convenient place in which to mention the court constituted by the Benefices Act, 1898 (61 & 62 Vict. c. 48). This court consists of the archbishop, and a judge of the Supreme Court nominated from time to time by the Lord Chancellor. The present judge is Mr. Justice Gainsford Bruce. The Act provides, that when a bishop, on any of the grounds specified in it, or on the ground of unfitness or disqualification of the presentee, otherwise sufficient in law (except a ground of doctrine or ritual), refuses to institute or admit a presentee to a benefice, he shall signify such refusal in writing to the person presenting and the presentee, and that either of these persons may require the matter to be heard by the court so constituted. The judge's decision is final, and the archbishop is required to give judgment in accordance with it. The rules made under this Act will be found in the *Annual Statutes*, 1899, by Lely, p. 7.

(*y*) Hale, Hist. C. L. ch. 2; *Ex parte Tucker* (1840), 1 Man. & G. 519; *Tucker* v. *Inman* (1842), 4 Man. & G. 1049; *Martin* v. *Mackonochie* (1878), 3 Q. B. D. 730; 4 Q. B. D. 697.

[being ascertained and asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the alderman (or, in his absence, the sheriff of the county) used to sit together in the county court, and had there the cognizance of all causes, as well ecclesiastical as civil; a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judge in temporal (*z*). It afterwards, however, became an established rule, that all ecclesiastical persons, and all ecclesiastical causes, should be solely and entirely subject to the ecclesiastical jurisdiction (*a*); and soon after the Norman conquest, William the Conqueror (whose title was warmly espoused by the monasteries, which he had liberally endowed, and by the foreign clergy, whom he had brought over in shoals, and planted in the best preferments of the English Church) was prevailed upon to separate the ecclesiastical court from the civil, and to prohibit any spiritual cause from being tried in the secular court (*b*). And although Henry the First, on his accession, restored the union of the civil and ecclesiastical courts (*c*), the restoration was ill-relished by the popish

(*z*) "*Celeberrimo huic conventui* "*episcopus et aldermannus interesunto; quorum alter jura* "*divina, alter humana populum* "*edoceto.*"—Wilk. *Leg. Angl.-Sax. LL.* Eadg. ch. 5.

(*a*) "Hence the canon lays it "down as a rule, that '*sacerdotes* "*a regibus honorandi sunt, non* "*judicandi*' (Decret. part 2, caus. "11, qu. 1, ch. 41); and places an "emphatical reliance on a fabulous "tale which it tells of the Emperor "Constantine, that when some "petitions were brought to him, "imploring the aid of his authority against certain of his bishops "accused of oppression and injustice, he caused (says the holy "canon) the petitions to be burnt "in their presence, dismissing "them with this valediction: '*Ite* "*et inter vos causas vestras discutite, quia dignum non est ut* "*nos judicemus Deos.*'" (3 Bl. Com. p. 62.)

(*b*) Hale, Hist. C. L. 102; 4 Inst. 259; Wilk. *Leg. Angl.-Sax.* 292. [As was before observed, the Ordinance here referred to excluded spiritual pleas from the *hundred* court only. But it seems to have been interpreted in the way described by Blackstone. —E. J.]

(*c*) 2 Inst. 70.

[clergy, who, under the guidance of Archbishop Anselm, disapproved of a measure which put them on a level with the laity, and which subjected spiritual men and causes to the inspection of the secular magistrates. And, therefore, in their synod at Westminster, 3 Hen. I. (1103), they ordained, that no bishop should attend the discussion of temporal causes, the effect of which ordinance was speedily to dissolve the newly-effected union; and the usurper Stephen, being supported by the clergy, directed, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction (*d*).] Such was the origin of the ecclesiastical courts as separate and independent tribunals.

The jurisdiction which the ecclesiastical courts (otherwise called the spiritual courts or courts christian) assumed to exercise, was the administration of justice in all matters in any way connected with the church,—which included matters *testamentary* and *matrimonial*, besides a great variety of others. The jurisdiction of these courts in matters testamentary and matrimonial has now ceased, that jurisdiction having, by the Court of Probate Act, 1857, and the Matrimonial Causes Act, 1857 (20 & 21 Vict. cc. 77, 85), been transferred to and vested in the Court of Probate and the Court for Matrimonial Causes, two purely secular tribunals, which are now represented by the Probate Divorce and Admiralty Division of the High Court; but the jurisdiction of the ecclesiastical courts in other matters still remains vested in them.

The particular ecclesiastical courts which have retained their jurisdiction, are the following:—(1.) the Court of the Archdeacon; (2.) the Court of the Bishop, otherwise called the Consistory Court; (3.) the Provincial Court of the Archbishop; (4.) the Court of Appeal. We shall proceed to consider each of these courts in the order in which they have just been enumerated.

(*d*) Spelm. *Con.* 310.

1. The Court of the Archdeacon, which holds the lowest place in the ecclesiastical polity, is held, in each archdeaconry, before a judge appointed by the archdeacon himself, and called his Official; and the jurisdiction of this court extends to and comprises all ecclesiastical causes arising within the archdeaconry. But the litigant may, as a general rule, commence his suit either in this court or in that of the bishop, though, in some archdeaconries, the suit must be commenced in the former, to the exclusion of the latter (*e*). From the archdeacon's court an appeal lies, in general, to that of the bishop, by virtue of the 24 Hen. VIII. (1532), c. 12, commonly called the First Act of Appeals.

2. The Bishop's Court (otherwise called the Consistory Court) is held in the several dioceses, for the trial of all ecclesiastical causes arising within the diocese (*f*). To this Court have been specially assigned all proceedings instituted against clerks (for *immorality* and the like) under the Clergy Discipline Act, 1892 (*g*). The chancellor of the diocese (or his commissary) is the judge; and under the 24 Hen. VIII. (1532), c. 12, an appeal lies from this Court to the Provincial Court of the Archbishop, save as regards proceedings under the Clergy Discipline Act, 1892, the appeal in which is (at the option of the appellant) either to the Provincial Court or to the Privy Council, and is confined to questions of *law* only (*h*).

3. The Provincial Court of the Archbishop.—This court, which in the province of York is (or used to be) called the Chancery Court of York, and in the province of Canterbury the Court of Arches, receives and determines appeals from

(*e*) *Woodward* v. *Fox* (1691), 2 Vent. 267; Godolph. 61.

(*f*) See *R.* v. *Tristram*, [1902] 1 K. B. 816, where the chancellor's jurisdiction was decided to be conditional on his consulting and getting the consent of the bishop; and, the condition not having been complied with, prohibition was granted.

(*g*) 55 & 56 Vict. c. 32, s. 2; *Lee* v. *Flack*, [1896] P. 138; *Gist* v. *Fillingham*, [1901] P. 176; *Sweet* v. *Ely*, [1902] 2 Ch. 508; *Sweet* v. *Young*, [1902] P. 37.

(*h*) Act of 1892, s. 4.

the sentences of all inferior ecclesiastical courts within the province. The judge of the court is called the Official Principal (*i*). The proper jurisdiction of the Court is appellate ; but *original* suits may also be brought therein, *i.e.*, suits the cognizance of which belongs properly to the inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction (*k*).

The *Court of Peculiars* is a branch of the Court of Arches, and has jurisdiction over all those parishes (dispersed throughout the province of Canterbury in the midst of other dioceses), which are exempt from the Ordinary's jurisdiction, and subject to the Metropolitan only. All ecclesiastical causes, arising within these peculiar (or exempt) jurisdictions, are originally cognizable by this court, save only questions of residence and as to pluralities (*l*).

The two Provincial Courts are now united, and have been arranged on a new basis ; by the Public Worship Regulation Act, 1874 (*m*), which provided, that the two archbishops might (subject to the approval of the Crown) appoint "a judge of the Provincial Courts of Canterbury and York,"—and that all proceedings taken before him should be deemed to be taken in the Arches Court of Canterbury or the Chancery Court of York, as the case might require, and that such judge should also become *ex officio* master of the faculties to the Archbishop of Canterbury. So that one tribunal now exercises all the ecclesiastical functions of these various officials, in a consistent and uniform way (*n*).

(*i*) The judge of the Court of Arches is also called the *Dean of the Arches*, because anciently he held his court in the church of St. Mary-*le-bow* (Sancta Maria *de Arcubus*).

(*k*) *Burgoyne* v. *Free* (1825), 2 Addams, Ecc. Rep. 406 ; *Ex parte Denison* (1854), 4 El. & Bl. 292.

(*l*) Pluralities Act, 1838, s. 108 ; Pluralities Act, 1885.

(*m*) 37 & 38 Vict. c. 85.

(*n*) Rules for the procedure of the united provincial court with regard to proceedings taken under

4. The Court of Appeal.—This is the Judicial Committee of the Privy Council (*o*), which has superseded the old *Court of Delegates*, the latter being a commission out of Chancery, rather than a court, and existing by virtue of the 25 Hen. VIII. (1534), c. 19, which authorized all manner of appeals to be had and prosecuted from the archbishops' courts to the Crown in Chancery, the appeal prior to that statute having been to the Pope.

[Appeals to Rome, we may here observe, were always, even in the times of popery, looked upon by the English nation with suspicion, being deemed not only contrary to the liberty of the subject, but contrary also to the honour of the Crown and to the independence of the realm; and the Constitutions of Clarendon, of 1164, expressly declared, that appeals in causes ecclesiastical ought to lie from the archdeacon to the diocesan, from the diocesan to the archbishop of the province, and from the archbishop to the king; nor were they to proceed any further without special licence from the Crown (*p*). But in the reigns of King John and his son, Henry the Third, the custom of appealing to Rome in causes ecclesiastical was re-introduced, and was never thoroughly broken off till the reign of Henry the Eighth, when all the jurisdiction of the Pope in matters ecclesiastical was restored to the Crown, by the statute of 25 Hen. VIII. (1534), c. 19, before mentioned, which was in this particular but declaratory of the antient law of the realm (*q*).]

By the Privy Council Appeals Act, 1832, it was provided, that every person who might formerly have appealed to the Court of Delegates, should, for the future, bring his appeal to the King in Council instead; and by the Judicial

this Act, were issued in February, 1879. The present judge (1903) is Sir Lewis Tonna Dibdin, K.C.

(*o*) Privy Council Appeals Act, 1832; Judicial Committee Acts, 1833, s. 3; 1843; 1844, ss. 9, 12; *Gorham* v. *Bishop of Exeter* (1850), 15 Q. B. 52; Public Worship Regulation Act, 1874, s. 9.

(*p*) Ed. Stubbs, c. viii.

(*q*) 4 Inst. 341.

Committee Act, 1833, s. 3, Judicial Committee Act, 1843, s. 11, and Judicial Committee Act, 1844, s. 9, the King was empowered to direct all appeals from ecclesiastical courts to be referred for decision to the *Judicial Committee* of his Privy Council (*r*). And by the Appellate Jurisdiction Act, 1876, s. 14, provision is made (as noticed hereafter more fully) for the appointment of certain of the archbishops and bishops to attend as assessors of the Judicial Committee on the hearing of such appeals (*s*).

We now proceed to consider the wrongs or injuries of a pecuniary character that are cognizable in the different ecclesiastical courts, that is to say, (1) The subtraction of tithes; (2) The non-payment of ecclesiastical dues; (3) The spoliation of benefices; and (4) Dilapidations (*t*).

(*r*) As to this committee, *vide sup.* vol. II. pp. 473, 474.

(*s*) No notice has been taken in the text, of "the court of *high commission*," regarding which Blackstone (vol. iii. p. 68) says, —"This court was erected and "united to the regal power by "virtue of the statute 1 Eliz. c. 1, "instead of a larger jurisdiction "which had before been exercised "under the Pope's authority. It "was intended to vindicate the "dignity and peace of the Church, "by reforming, ordering, and correcting the ecclesiastical state "and persons, and all manner of "errors, heresies, schisms, abuses, "offences, contempts, and enormities. Under the shelter of "which very general words, means "were found, in that and the "two succeeding reigns, to vest "in the high commissioners extraordinary and almost despotic "powers of fining and imprisoning; which they exerted much "beyond the degree of the offence "itself, and frequently over "offences by no means of spiritual "cognizance. For which reasons "this court was justly abolished "by statute 16 Car. 1, c. 11."

(*t*) There was also in the spiritual court a proceeding called *pro salute animæ*,—the offences which were so proceeded against being described in the Report of the Commissioners on the ecclesiastical courts, dated 15th July, 1832, as being (1) Those "committed by the clergy themselves, such as neglect of duty, "immoral conduct, advancing "doctrines not conformable to "the Articles of the Church, "suffering dilapidations, and the "like offences"; and (2) Those "committed by laymen, such as "brawling, laying violent hands, "and other irreverent conduct "in the church or churchyard, "violating churchyards, neglecting to repair ecclesiastical "buildings, incest, incontinence." . . . "These offences" (the

[(1.) The *Subtraction of Tithes.*—This wrong or injury consists in the withholding of tithes from the rector or from the vicar: and whether the rector is a clergyman or a lay appropriator makes no difference (*u*). But the ecclesiastical courts have no jurisdiction to try the *right* to tithes, unless between spiritual persons (*x*); so that, if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, as such questions affect the temporal inheritance, and the determination thereof would bind the real property (*y*). But where the *right* does not come into question, but only the *fact* whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury for which the remedy (viz., the recovery of the tithes, or their equivalent) may properly be had in the spiritual court. However, in modern times, it hath seldom happened that tithes are sued for in the spiritual court; for if the defendant pleads any custom, *modus*, composition, or other matter whereby the right of tithing is called into question, this takes it out of the jurisdiction of the ecclesiastical judge, the law not permitting the existence of such a right to be decided by the sentence of any ecclesiastical judge.] Moreover, a summary method for the recovery

Report goes on to state) "are "punished by monition, penance, "excommunication, suspension "*ab ingressu ecclesiæ*, suspension "from office, and deprivation." But the offences of that character are now, when it is a matter of doctrine or of worship, proceeded against under the Church Discipline Act, 1840; and, when it is a matter of morality, under the Clergy Discipline Act, 1892, and (to some extent) under the Benefices Act, 1898. The spiritual court formerly entertained also suits for *defamation*, where the offence of incontinency was wrongfully imputed; but by the Ecclesiastical Courts Act, 1855, the jurisdiction in this matter was abolished. And the jurisdiction in "brawling," against persons not in holy orders, was taken away by the Ecclesiastical Courts Jurisdiction Act, 1860, s. 1.

(*u*) Stat. 32 Hen. 8 (1540), c. 7.

(*x*) 2 Roll. Abr. 309, 310; Bro. Abr. tit. *Jurisdiction*, 85.

(*y*) 2 Inst. 364, 389, 490; 13 Edw. 1 (statute *Circumspectè agatis*).

of tithes where the value did not exceed 10*l.* (or, where due from Quakers, 50*l.*) having been given by the Ecclesiastical Courts Act, 1813, by complaint to two justices of the peace, this proceeding before justices was, by the 5 & 6 Will. IV. (1835), c. 74, and 4 & 5 Vict. (1841), c. 36, made the *only* remedy for the recovery of tithes not exceeding the above value, no suit for their recovery being allowed either in the civil or in the ecclesiastical courts, although, if the title to the tithes was *bonâ fide* brought into question, an action in the temporal courts to try the question was permitted as before (*z*). Besides all which, it is to be recollected, that the claim itself to tithes has now become of rare occurrence, this species of property having been, in almost every parish, now commuted into a corn rent-charge under the Tithe Commutation Acts. For the recovery of this rent-charge when in arrear, a special mode of proceeding by way of distress and otherwise, or now by action, has been provided (*a*).

[(2.) *Non-payment of Ecclesiastical Dues.*—This is the second injury cognizable in the spiritual courts ; and it consists in the withholding from the clergy of such dues as pensions, mortuaries, compositions, offerings, and *surplice-fees*, all which may be recovered by a decree for their payment.] But the provisions of the Tithe Commutation Acts with regard to the recovery of *tithes*, extend also to oblations and all other ecclesiastical dues and demands whatsoever (*b*).

[(3.) The *Spoliation of Benefices.* — Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice under a pretended title and without any right thereto ; and this injury is remedied by a decree to account for the profits so taken. When the *jus patronatûs* (or right of advowson) doth not itself come

(*z*) *Peyton* v. *Watson* (1842), 3 Q. B. 658 ; *Robinson* v. *Purday* (1846), 16 M. & W. 11.

(*a*) *Vide sup.* vol. II. p. 695.

(*b*) *Vide sup.* vol. II. pp. 703 704.

[into debate, this injury is cognizable in the spiritual court. For example, if a patron first presents A. to a benefice, who is instituted and inducted thereto, and then, upon pretence of a vacancy, *the same* patron presents B. to the same living, and he also obtains institution and induction, here, if the fact of the vacancy be disputed, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, *i.e.*, for taking the profits of his benefice; and it shall there be tried, whether the living were, or were not vacant, that being the question upon which the validity of the second clerk's pretensions must depend (*c*). But if the right of patronage itself comes at all into dispute, as, *e.g.*, if one patron presented A. and another patron presented B., there the ecclesiastical court hath no cognizance, provided the profits sued for amount to a fourth part of the value of the living; but may be prohibited, at the instance of either patron, by the writ of *indicavit* (*d*). And if a clerk, without any colour of title, ejects another from his parsonage, this injury also must be redressed in the temporal courts; for it depends upon no question determinable by the spiritual law, such as vacancy or no vacancy, but is merely a civil injury.

(4.) *Dilapidations.*—These are a kind of ecclesiastical waste to the chancel or to the parsonage-house and the buildings belonging thereto (*e*). The waste may be either voluntary, by pulling down, or permissive, by suffering to decay (*f*); and for each species of waste, an action will lie either in the spiritual court or in the temporal court (*g*). The action may be brought by the successor against the predecessor (if living), or against his legal personal repre-

(*c*) F. N. B. 36.

(*d*) See 13 Edw. 1 (*Circ. aga.*); *Artic. Cleri*, 9 Edw. 2 (1314), st. 1, c. 2; F. N. B. 45.

(*e*) *Vide sup.* vol. II. p. 678.

(*f*) See also 13 Eliz. (1571), c. 10, as to a spiritual person making over his goods with intent to defeat his successor of his remedy for dilapidations.

(*g*) *Jones* v. *Hill* (1690), Cart. 224; *S. C.* 3 Lev. 268; *Mordey* v. *Leacroft*, [1896] P. 92; *Neville* v. *Kirby*, [1898] P. 160.

[sentatives (if dead);] but the proceedings in respect of dilapidations are now taken, in general, under the Ecclesiastical Dilapidations Acts, 1871 and 1872 (*h*), more particularly referred to in a former volume (*i*).

Proceedings in the spiritual courts might also, until recently, have been brought for the *non-payment of a church-rate;* but by the Ecclesiastical Courts Act, 1813, the 5 & 6 Will. IV. (1835), c. 74, and the 4 & 5 Vict. (1841), c. 36, where the rate was not disputed, and the amount demanded did not exceed 10*l.*—or in the case of Quakers, 50*l.*,—the remedy was before the justices of the peace (*k*). And now, by the Compulsory Church Rate Abolition Act, 1868, s. 1, no suit or proceeding to compel the payment of a church-rate can be brought in any ecclesiastical or other court, or before any justice or magistrate (*l*).

The spiritual courts have also jurisdiction in suits respecting *pews and seats* in the body of the church (*m*); but where a pew is claimed by prescription, and the right is disputed, the temporal court will, by writ of prohibition, prevent the ecclesiastical court from proceeding farther, in order that the claim by prescription may be determined by a jury, or at least in accordance with the rules of the common law (*n*).

[As regards the procedure in the ecclesiastical courts, the ordinary course is as follows. There is first a *citation*, to call the party injuring before them; and then, secondly, a *libel* (*libellus*, a little book), or articles drawn out in a formal *allegation*, and setting forth the complainant's ground of complaint (*o*). To this succeeds the *defendant's*

(*h*) 34 & 35 Vict. c. 43; 35 & 36 Vict. c. 96.

(*i*) Vol. II. pp. 678, 679.

(*k*) *Ex parte Mannering* (1862), 2 B. & S. 431; *Pease* v. *Chaytor* (1863), 3 B. & S. 620.

(*l*) *Vide sup.* vol. II. 666.

(*m*) *Mainwaring* v. *Giles* (1822), 5 B. & Ald. 356; *Parker* v. *Leach* (1866), L. R. 1 P. C. 312.

(*n*) *Stileman-Gibbard* v. *Wilkinson*, [1897] 1 Q. B. 749.

(*o*) Church Discipline Act, 1840, ss. 7, 8; and Rules of 1867. As to the procedure in the Consistory Court of London, see the Rules of 1877 (2 P. D.).

[*answer* upon oath, when, if he denies or extenuates the charge, the plaintiff proceeds to *proofs* (*p*). If the defendant has any circumstances to offer in his defence, he must propound them in a *defensive allegation;* and then there is the *plaintiff's answer* upon oath, and the defendant may then proceed to proofs (*q*).] And, by the Evidence Act, 1851, s. 2, and the Ecclesiastical Courts Act, 1854, the court may summon witnesses, and examine them, or cause them to be examined, by word of mouth, and that either before or after examination by deposition or affidavit (*r*); and notes of such evidence are taken down in writing by the judge, or registrar, or by such other person and in such manner as the judge may direct. [When all the pleadings and proofs are concluded, they are referred to the consideration of the judge, who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definite sentence* at his own discretion.

The ecclesiastical courts have power to pronounce

(*p*) In former times, when a clergyman was cited to appear before the bishop or ecclesiastical court for alleged misconduct, he might have been required to make answer on the oath of himself and his *compurgators;* which latter persons were certain of his neighbours able to swear that they believed him innocent of the charge. And this oath, *ex officio* (as it was called), although prohibited generally to laymen (12 Rep. 26), was yet continued, as regarded the clergy, till the middle of the seventeenth century, when it was abolished by the 13 Car. 2 (1661), st. 1, c. 12. (Report of Commissioners on Ecclesiastical Courts, 15 Feb. 1832, p. 55.)

(*q*) In Brice, *Law Relating to Public Worship* (chap. iv.), it is pointed out, that there is a difference in the proceedings, according as the suit is civil or criminal. In a civil suit, they are said to commence with a *citation*, *decree*, *monition*, or *act on petition;* and then come the *libel*, the *litis contestatio*, and the *pleas* and *answers*. In criminal suits, the first plea is termed the *articles*, nominally brought under the sanction and in the name of some bishop, whose "*office*" is thus said "*to be promoted*"; and the articles must not be inconsistent with, or beyond, the citation.

(*r*) Church Discipline Act, 1840, s. 17; *Bishop of Norwich* v. *Pearce* (1868), L. R. 2 Adm. & Ecc. 281.

[(among other sentences) sentence of *suspension* (*s*), and even sentence of *deprivation*, in the case of suits against beneficed incumbents (*t*); and also sentence of *excommunication*, for offences falling under ecclesiastical cognizance. As regards the sentence of excommunication, that is described in the books as being of two kinds, the lesser and the greater; the lesser excommunication excluding the party from participation in the sacraments, the greater excluding him not only from these, but also from the company of all Christians. Formerly, too, and until the passing of the Act to be presently mentioned, an excommunicated man was disabled to do any act that was required to be done by a *probus et legalis homo*; *e.g.*, he could not serve upon juries, or be a witness in any court, or bring an action, either real or personal, to recover lands or money due to him. It was the practice of the ecclesiastical courts to avail themselves of the weapon of excommunication, in order to enforce their sentences and orders in general; for where any of these were disobeyed, the court excommunicated the disobedient party, by which not only did he become subject to the consequences above described, but the general law of England stepped in besides to the court's assistance, permitting the bishop to certify the excommunication to the king in Chancery, who issued thereon, to the sheriff of the county, a writ, called (from the bishop's certificate) a *significavit*, or (from its effects) a writ *de excommunicato capiendo*, under which the offender was taken to the county gaol, and was there imprisoned until he was reconciled to the Church.] But by the Ecclesiastical Courts Act, 1813, it was provided, that no excommunicated person should incur by the

(*s*) Suspension may be either *ab officio* merely, or *ab officio et beneficio* (Brice, *Public Worship*, p. 280).

(*t*) *Martin* v. *Mackonochie* (No. 1) (1878), 3 Q. B. D. 730; 4 Q. B. D. 697; 6 App. Ca. 424; *Bonwell* v. *Bishop of London* (1861), 14 Moo. P. C. 395; *Dean* v. *Green* (1882), 8 P. D. 79; *Martin* v. *Mackonochie* (No. 2) (1881), 6 P. D. 87; 7 P. D. 94; and 8 P. D. 191.

sentence of excommunication any penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the ecclesiastical court should direct; and that such sentence, until it was signified to the Crown in Chancery, should not be enforced by the writ *de excommunicato capiendo*. By the same Act, excommunication, *as for contempt*, was in effect abolished; and in lieu thereof, it has been provided, that, where a lawful citation or sentence has not been obeyed, or where a contempt *in facie curiæ* has been committed, the judge shall have power to pronounce such person "contumacious and in contempt," and, after a certain period, to signify the same to the Crown in Chancery. Whereupon a writ *de contumace capiendo* will issue (*u*), which writ is to have the same force and effect as formerly belonged to a writ *de excommunicato capiendo*.

IX. *The Courts of the Universities of Oxford and Cambridge.*—These are courts subsisting under antient charters granted to these universities, and confirmed by Act of Parliament; and they have an exclusive jurisdiction in (*inter alia*) actions of a civil nature in which any member or servant of the university is a party, in every case at least where the cause of action arises within the liberties of the university, and the member or servant was resident in the university when it arose (*x*). [This privilege of exclusive civil jurisdiction was granted, that the students might not be distracted from their studies, by legal process from distant courts or by other forensic avocations; and the like privilege appears to have been

(*u*) *R.* v. *Ricketts* (1837), 6 A. & E. 537; *R.* v. *Baines* (1840), 12 A. & E. 210; *Adlam* v. *Colthurst* (1867), L. R. 2 Adm. & Ecc. 30; *Dean* v. *Green* (1882), 8 P. D. 79; *Ex parte Green* (1881), 7 Q. B. D. 273; *Green* v. *Ld. Penzance* (1881), 6 App. Ca. 657.

(*x*) 4 Inst. 227; *Browne* v. *Renouard* (1810), 12 East, 12; *Thornton* v. *Ford* (1812), 15 East, 634; *Turner* v. *Bates* (1847), 10 Q. B. 292.

[antiently granted also to all the universities of Europe, in pursuance of a constitution of the Emperor Frederick, A.D. 1158. The most antient charter containing this grant to the university of Oxford, was 28 Hen. III. (A.D. 1244); and the privileges thereby granted were confirmed and enlarged by almost every succeeding prince, down to King Henry the Eighth, in the fourteenth year of whose reign, (A.D. 1523,) the largest and most extensive charter of all was granted. This last-mentioned charter is the charter now governing the privileges of that university; and a charter, somewhat similar to that of Oxford, was afterwards granted to Cambridge, in the third year of Queen Elizabeth (1561). The statute of 13 Eliz. (1571) c. 29, subsequently recognised and confirmed *all* the charters of these two universities, and those of the 14 Hen. VIII. (for Oxford) and 3 Eliz. (for Cambridge) by name (*y*); which *blessed Act*, as Sir Edward Coke entitles it (*z*), fully established the civil privileges of these universities.] It is to be observed, however, that the privilege can be claimed only on behalf of members who are defendants; and when an action in the High Court is brought against such member, the university enters a *claim of conusance*, that is, claims the cognizance of the matter, whereupon the action is withdrawn from the High Court and transferred to the university court (*a*). But as regards the university of Cambridge, the privilege is, *semble*, no longer exclusive (*b*). The procedure in the university courts is, for the most part, regulated according to the laws of the civilians, but is subject to any specific rules made by the vice-chancellor with the approval of three of his Majesty's judges. And, as regards appeals, the procedure thereon

(*y*) *Ginnett* v. *Whittingham* (1886), 16 Q. B. D. 761 (Oxford); and *Browne* v. *Renouard* (1810), 12 East, 12 (Cambridge).

(*z*) 4 Inst. 227.

(*a*) *Ginnett* v. *Whittingham*, *sup.*

(*b*) 19 & 20 Vict. (1856), c. xvii. s. 18.

is like that on appeals from other inferior courts, the appeal being to a Divisional Court of the High Court of Justice (*c*).

X. *The Court of Chivalry, and Courts Martial.*—There was anciently a court military called the *Court of Chivalry*, held before the lord high constable and the earl marshal of England, which court was of an eccentrical character, foreign to the general or common law of the realm. And although this court was not a court of record, yet it had a jurisdiction criminal as well as civil; relating to deeds of arms and of war, and to the redressing of injuries of honour, and encroachments in matters of coat-armour, precedency, and other distinctions of families. As a court of honour, the Court gave satisfaction where no other remedy was available, by ordering reparation in point of honour: and for that purpose, it would, *e.g.*, compel the defendant to take the lie upon himself, or to make such other submission as the law of honour required. But the Court did not award pecuniary satisfaction or damages. The Court adjusted also questions concerning the right to armorial ensigns, bearings, crests, supporters, pennons, and the like: and it determined all rights of place and precedence, subject to any royal patent or Act of Parliament. But, latterly, the marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, has fallen into the hands of certain officers called heralds; whose testimony as to descent (it may be observed incidentally) is no longer of the same weight as it once was. Nor is such testimony even admissible, as a general rule, as evidence in courts

(*c*) See (as to Oxford) 25 & 26 Vict. (1862), c. 26, s. 12; and Rules of March 21, 1892, and Order in Council of 23rd August, 1894. See also (as to both Universities) Judicature Act, 1894, s. 1 (5): and (as to Cambridge) the 57 & 58 Vict. c. lx. (the Cambridge University and Corporation Act, 1894). The criminal jurisdiction of the university courts will be found described in Bk. vi. ch. x., *post*.

of justice ; but the original visitation books of the Herald's Office, compiled at a time when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to the heralds upon oath, are still allowed to be good evidence of pedigree (*d*). The method of commencing proceedings in the Court of Chivalry was by petition ; and the trial was either by witnesses or by combat, with an ultimate appeal to the king in person (*e*). But the Court has long since ceased to exercise any jurisdiction as a court of military or martial law ; and, indeed, military or martial law has now no place in the institutions of this country, unless under the articles of war established under the Army Act, 1881 (44 & 45 Vict. c. 58), and the annual Act which brings into force or continues in force yearly in every year, and for no longer period, the provisions of that Act. All offences, cognisable under these articles of war, are tried before the *courts-martial* which are from time to time constituted, as the occasion requires and as is provided by the Act ; and no appeal lies from the decision of a court-martial, but the matter comes before the king personally, that is to say, before the commander-in-chief of the forces.

(*d*) *Matthews* v. *Port* (1687), Comb. 63 ; Taylor, *Evidence*, 9th ed. 1167.

(*e*) 13 Ric. 2 (1389), st. 1, c. 2 ; Com. Dig. *Courts* ; Bac. Abr. *Courts* ; *Parker's Case* (1668), 1 Lev. 230 ; Show. Parl. Ca. 60 ; 4 Inst. 125.

CHAPTER IV.

OF THE SUPREME COURT OF JUDICATURE.

We now proceed to consider the superior courts of law and equity, and the changes which have been effected therein by the Judicature Acts (*a*) : changes the general effect of which has been to unite in one court all the superior courts theretofore existing, so that justice is now administered in a *single* supreme court, in one or other of the Divisions of which an appropriate remedy for all manner of injuries may be had.

From the time then that the above Acts came into operation—that is to say, from the 1st November, 1875—the jurisdictions previously vested in or capable of being

(*a*) The Judicature Acts are :—36 & 37 Vict. (1873), c. 66 ; 37 & 38 Vict. (1874), c. 83 ; 38 & 39 Vict. (1875), c. 77 ; 39 & 40 Vict. (1876), c. 59 ; 40 & 41 Vict. (1877), c. 9 ; 41 & 42 Vict. (1878), c. 35 ; 42 & 43 Vict. (1879), c. 78 ; 44 & 45 Vict. (1881), c. 68 ; 46 & 47 Vict. (1883), c. 29 ; 47 & 48 Vict. (1884), c. 61 ; 53 & 54 Vict. (1890), c. 44 ; 54 & 55 Vict. (1891), c. 14 ; 54 & 55 Vict. (1891), c. 53 ; 57 & 58 Vict. (1894), c. 16 ; and 62 & 63 Vict. (1899), c. 6. Various orders and rules of practice have from time to time been made, by the "Rule Committee" of the judges, under these Acts, the principal of which (now in force) are those of 1883 ; but others have since been (and are from time to time being) added to these. There are also the orders as to court fees, and rules as to funds in court, besides a great variety of rules under particular statutes. And the multiplicity of these (and of other like) statutory rules having become exceedingly embarrassing, the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), has been passed to regulate the making of such rules, and to provide for their being duly known before they become operative. By the Judicature Act, 1894, s. 4, the rule-making committee of the judges now includes the President of the Law Society, one practising barrister, and one other person appointed by the Lord Chancellor.

exercised by the Court of Chancery, the Court of King's Bench, the Court of Common Pleas, the Court of Exchequer, the Court of Admiralty, the Court of Probate, and the Court for Divorce and Matrimonial Causes, were transferred to and became vested in the High Court of Justice, so as to effect a union and consolidation of those several courts; and the London Court of Bankruptcy has since been united thereto, and its jurisdiction assigned to the King's Bench Division (*b*). All these Courts therefore now constitute (in conjunction with the Court of Appeal, newly established by the Acts) one single supreme tribunal called the "Supreme Court of Judicature," wherein is administered both law and equity; so that if any plaintiff, petitioner, or defendant, shall advance an *equitable* claim or defence, such relief is given therein as theretofore by the Court of Chancery, and all *legal* claims, demands and liabilities existing by common law, custom, or statute, are recognized and given effect to therein, as theretofore by any of the above-mentioned courts (*c*).

This Supreme Court of Judicature is divided into the "Court of Appeal" and the "High Court of Justice." Before we treat further of the constitution of this court, it will be necessary to give some account of each of the courts out of which it was composed. And we shall commence with—

I. *The Court of Chancery, otherwise called the High Court of Chancery.*—This Court [is said to have taken its name from the judge who presided over it, the Lord Chancellor. The office and name of Chancellor was certainly known to the Courts of the Roman emperors, and from the Roman empire, it passed to the Roman Church, whence every bishop has to this day his chancellor; and when the modern kingdoms of Europe were established upon the ruins of the Roman empire, almost

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 92—94.

(*c*) Act of 1873, ss. 16, 24.

every state preserved its chancellor. And although the chancellor appears to have had different jurisdictions and dignities in the different states, still, in all of them, he seems to have had the supervision of all charters, letters, and such other public instruments of the Crown as were authenticated in the most solemn manner; and when seals came in use, he had invariably the custody of the great seal. And, in fact, the office of the chancellor or lord keeper (for by the statute 5 Eliz. (1563), c. 18, the two designations were declared to be exactly the same), is with us at this day created by the mere delivery of the Great Seal into his custody (*d*); and he thereby becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior, in point of precedency, (if of the peerage,) to every temporal lord (*e*). He is a privy councillor by his office (*f*), and, according to Lord Chancellor Ellesmere, prolocutor (or speaker) of the House of Lords by prescription (*g*): and to him (under the Crown) belongs also the appointment of justices of the peace throughout the kingdom, a power which (in the case of county magistrates) he usually exercises on the nomination of the lord lieutenant of the county. And from having formerly been usually an ecclesiastic, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of royal foundation; and patron of all the king's livings of the value of 20*l.* per annum or under, in the king's books (*h*). As the representative of the Crown he is also the general guardian of all infants, idiots, and lunatics; has the general superintendence of all charitable uses in the kingdom; appoints to the

(*d*) Lamb. *Archaion*, 65; 1 Roll. Abr. 385.

(*e*) Stat. 31 Hen. 8 (1540), c. 10, ss. 4, 8.

(*f*) Selden, *Office of Lord Chancellor*, sect. 8.

(*g*) *Of the Office of Lord Chancellor*, edit. 1561.

(*h*) Madox, *Hist. of Exchequer*, 42; *Lord Chancellor's Case*, Hobart, 214; Gibs. 764; 1 Burn, *Ecc. Law*, 129.

[church livings vested in Roman Catholics; and distributes other offices, dignities, and patronage.

The chancellor used to exercise, besides, a very large jurisdiction in the Court of Chancery, the principal part of which was concerned with that portion of our law which is called *equity*, although a not inconsiderable portion of the common law also lay within the jurisdiction of the Court (*i*), as in *scire facias* to cancel letters patent, and on petitions of right, traverses of office, and the like.

As regards the distinction between law and equity, and their administration in different courts, the distinction is sensible enough in itself (*k*), and it prevailed also in the Roman law, the *jus prætorium* (or discretion of the prætor) being distinct from the *leges* (or standing laws). But in the Roman law, the power of administering both law and equity centred eventually in one and the same magistrate, just as has now happened in the English law, by the effect of the fusion of law and equity under the Judicature Acts. It is not very clear, in what manner or under what circumstances the administration of equity, as a matter distinct from law, was first established in this country; but it seems, that there was a frequent failure of justice in the common law courts, and that the application for redress

(*i*) The Court of Chancery consisted of *two distinct tribunals*, one being a court of equity, and the other a court or office of *common law*. Out of the latter court (as an *officina justitiæ*) issued all original writs passing under the Great Seal, and all commissions of sewers, lunacy, and the like. And here it may be mentioned, that some of these writs were originally kept in a *hamper* (whence the "hanaper office"), and others in a little sack or bag (whence the "petty bag office"). And as to the office of the Crown in Chancery, see 37 & 38 Vict. c. 81 (Great Seal (Offices) Act, 1874); 40 & 41 Vict. c. 41 (Crown Office Act, 1877); 43 & 44 Vict. c. 10 (Great Seal Act, 1880); 47 & 48 Vict. c. 30 (Great Seal Act, 1884); and 53 Vict. c. 2 (Crown Office Act, 1890), the Office of the Crown in Chancery being wholly distinct from the Crown Office, K. B. Division, as to which see *infra*.

(*k*) Bacon, *De Aug. Scient.* lib. viii. ch. 3, app. 45.

had to be made to the king in person, who was wont to refer the matter to his chancellor, for him to decide as the circumstances (*i.e.*, the equity) of the case should require. Apparently, in these early times the chief juridical employment of the chancellor was in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the Chancery, who were too much attached to antient precedent, it was provided by the Statute of Westminster the Second (13 Edw. I.) c. 24, —called the statute *in Consimili Casu*, —that "whensoever from thenceforth in one case a writ "shall be found in the Chancery, and in a like case, "falling under the same right and requiring the like "remedy, no precedent of a writ can be produced, the "clerks in Chancery shall agree in framing a new writ: "and if they cannot agree, it shall be adjourned to the "next parliament, where a writ shall be framed by con-"sent of the learned in the law, lest it should happen for "the future that the court of our lord the king be deficient "in doing justice to the suitors."

This statute *in Consimili Casu* might, with a little pains on the part of the clerks of the Chancery, and a little liberality in the judges, have effectually saved the necessity of again recurring for extraordinary relief to the king or to his chancellor (*l*). But neither the pains nor the liberality were present; and when uses of land were introduced, towards the end of the reign of Edw. III., and the courts of the common law wholly declined to recognize them, the separate jurisdiction of the Chancery, as a court of equity, became inevitable. The decisive step was taken

(*l*) Blackstone (vol. iii. p. 51) remarks, that this was the opinion of Fairfax, a very learned judge in the time of Edward the Fourth, who says, "*Le subpœna ne serroit "ory cy soreadement use come il est "ore, si nous attendomus tiels "actions sur les cases, et main-"teinomus le jurisdiction de ceo "court, et d'auter courts.*"—Year B. 21 Edw. 4, 23.

[when Waltham, bishop of Salisbury and chancellor to King Richard the Second, by a strained interpretation of the Statute *in Consimili Casu*, devised the writ of *subpœna*, returnable in the Court of Chancery only, to make the feoffee to uses accountable to his *cestui que use;* and the writ of *subpœna* was afterwards extended, by the same chancellor and in spite of much obloquy and opposition, to other matters wholly determinable at the common law (*m*).

These *uses* of lands were from the first regarded by the ecclesiastical courts as *binding in conscience;* and, suits *pro læsione fidei*, being regarded as a spiritual offence, were entertained by the ecclesiastical courts. And although somewhat checked by the Constitutions of Clarendon, and even (it is said) adjudged to be contrary to law in the fourth year of King Henry the Third (*n*), still they appear to have been again recognized as in accordance with law, by the statute *Circumspectè Agatis* (13 Edw. I.) (*o*) ; and it is certain that the chancellor (who, as we have said, was in those times invariably an ecclesiastic) was in no way eager to discountenance suits of this nature. Suits *pro læsione fidei* continued, in fact, to be brought in the ecclesiastical courts till late in the fifteenth century (*p*).

It appears from the parliament rolls (*q*), that in the reigns of Henry the Fourth and Fifth, the commons were repeatedly urgent to have the writ of *subpœna* itself entirely suppressed, as being a novelty against the form of the common law devised by the subtlety of Chancellor Waltham, whereby (it was said) no plea could be deter-

(*m*) Waltham was in one instance obliged to pay damages to the party aggrieved by what was thought an unfair extension of the subpœna (17 Ric. 2 (1393), c. 6).

(*n*) Fitzh. Abr. tit. *Prohibition*, 15.

(*o*) Berthelet, *Stat. Antiq. Lond.* 1531, 90 b; 3 Pryn. *Rec.* 336, differing from Lyndewood, *Prov.* l. 2, t. 2, and from the Cotton MS. (Claud. D. 2).

(*p*) Year Book, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 4, 29; 20 Edw. 4, 10.

(*q*) Rot. Parl. 4 Hen. 4, Nos. 78 and 110; 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

mined, unless by examination and oath of the parties according to the form of the law civil and the law of holy Church, in subversion of the common law. Henry the Fourth so far yielded to this clamour as to pass the statute 1 Henry IV. (1402), c. 23, whereby judgments at law were declared irrevocable unless by attaint or writ of error: but Henry the Fifth turned a deaf ear to the urgency of the commons, and in Edward the Fourth's time, the process by bill and *subpœna* had become the established practice of the Court of Chancery (*r*).

The jurisdiction on *subpœna* in Chancery appears, however, to have for a long time remained very limited in its extent (*s*); and no regular judicial system at that time prevailed in the chancery, and, in fact, no professed lawyer sat in the court from the times of the Chief Justices Thorpe and Knyvet, successively chancellors to King Edward the Third, in 1372 and 1373 (*t*), till the promotion of Sir Thomas More to the chancellorship by King Henry the Eighth, in 1530. But after that time, the Great Seal was committed indiscriminately to lawyers, courtiers (*u*), or churchmen (*x*), until Serjeant Puckering was made lord keeper in 1592; and the office of Lord Chancellor has ever since then been filled by a lawyer, excepting during the short interval from 1621 to 1625, when the seal was entrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln, who had been chaplain to Lord Ellesmere, when chancellor.

In the time of Lord Ellesmere (A.D. 1616), the conflict between the courts of law and equity reached a crisis; and the matter being referred to the king, he (on the

(*r*) Rot. Parl. 14 Edw. 4, No. 33 not 14 Edw. 3, as cited 1 Roll. Abr. 370, &c.).

(*s*) *Diversité des Courtes*, tit. Chancery, fol. 296, Rastell's edit. A.D. 1534.

(*t*) Spelm. Gloss. 111; Dugd. Chron. Ser. 50

(*u*) Wriothesley, St. John, and Hatton.

(*x*) Goodrick, Gardiner, and Heath.

[advice of his counsel) gave judgment in favour of the court of equity (*y*).

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system ; but he did not sit long enough to effect any considerable revolution in the science itself, and but few of his decrees have been of any great consequence to posterity. Nor did his successors, in the reign of Charles the First, do much to improve the system ; and after the restoration of Charles the Second, the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer for nearly twenty years, and subsequently to the Earl of Shaftesbury, who, (though a lawyer by education,) had never practised at all. But a happier state of things began with Sir Heneage Finch, afterwards Earl of Nottingham, who succeeded to the chancellorship in 1673, and who is reported to have been a man of the greatest abilities and most uncorrupted integrity, a thorough master and zealous defender of the laws, and of a genius which enabled him to discover and to pursue the true spirit of justice, notwithstanding all its technical embarrassments. The then great extension of trade, and the then recent abolition of the military tenures, co-operated, moreover, with the abilities and genius of that Lord Chancellor ; and he was enabled, in the course of nine years, to build up a system of jurisprudence and jurisdiction upon wide and rational foundations. He has consequently been regarded as the founder and exponent of the more modern equitable system, although this was afterwards extended and improved by other great men, his successors in the chancellorship.]

The judicial duties of the Court of Chancery were from an early period shared in some measure by the Master of the Rolls, an officer of great dignity, who, although

(*y*) Whitelocke, *Parl.* ii. 390 ; 1 Chan. Rep. Append. 11.

originally appointed only for the superintendence of the writs and records appertaining to the common law side of the court (*z*), yet afterwards sat on the equity side as a separate though subordinate judge. And, there being some question as to the authority of the Master of the Rolls to hear and determine causes, it was declared, by the 3 Geo. II. (1729), c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the Great Seal alone, should be valid, subject nevertheless to be discharged or altered by the Lord Chancellor; and by the 3 & 4 Will. IV. (1833), c. 94, s. 24, the Master of the Rolls was authorized to hear motions, pleas, and demurrers, as well as causes generally, which should be set down for hearing before him (*a*).

The business of the Court of Chancery soon after increased to such an extent, that the Lord Chancellor and the Master of the Rolls together became unable to cope with it: and it was found necessary, in the year 1813, to appoint another assistant to the Lord Chancellor, in his judicial functions, under the title of Vice-Chancellor of England (*b*). And, after the transfer to the Court of Chancery of the equity business of the Exchequer, which took place in the year 1841, two more Vice-Chancellors were added (*c*), each of the three Vice-Chancellors sitting, (like the Master of the Rolls,) separately from the Lord Chancellor. A further addition was afterwards made of two judges, called the Lords Justices of the *Court of Appeal* in Chancery (*d*); and this court of appeal consisted, when the Judicature Acts came into operation, of the Lord Chancellor together with these two Lords Justices, and possessed all the jurisdiction exercised by the Lord Chancellor himself, so far as the judicial business in

(*z*) 4 Inst. 82.

(*a*) See Judicature Act, 1873, s. 16, sub.-s. (1).

(*b*) 53 Geo. 3, c. 24.

(*c*) Court of Chancery Acts, 1842, 1851, and 1852.

(*d*) Court of Chancery Act, 1851, and 30 & 31 Vict. (1867), c. 64.

Chancery was concerned. From this court of appeal an ultimate appeal lay to the House of Lords. But the Lord Chancellor might still have sate alone to hear appeals from the Court of Chancery; and he and the court of appeal might also have re-heard their own decisions, whereby the necessity of appealing to the House of Lords was in many cases obviated.

II. *The Court of King's Bench.*—This Court was so called because the king used formerly to sit there in person, whence the style of the court was *coram rege seipso*, or (as the case might be) *coram ipsâ reginâ;* and it was the supreme court of common law in the kingdom (*e*). [This court, from the very nature and constitution of it, was not, nor could be, fixed to any certain place, but followed the king's person wherever he went. For which reason all process which issued out of this court in the king's name was originally made returnable *ubicunque fuerimus in Angliâ;* and by a special provision contained in the *Articuli super Cartas* of 1300, the king's chancellor, and the justices of his bench, were by law required to follow him, so that he might have at all times near unto him some officials learned in the law (*f*).

The jurisdiction of the court was very high and transcendent. For, First, it kept all inferior jurisdictions within the bounds of their authority, and might either remove their proceedings to be determined before it, or prohibit their further progress below (*g*); Secondly, it superintended all civil corporations in the kingdom; Thirdly, it commanded magistrates and others to do what their duty required, in every case where there was no other specific remedy; Fourthly, it protected the liberty of the subject by a speedy and summary interposition; and Fifthly, it took cognizance of both criminal and civil

(*e*) 4 Inst. 73.
(*f*) 28 Edw. 1, c. 5.
(*g*) *Farquharson* v. *Morgan*, [1894] 1 Q. B. 552.

causes, the former on what was called the Crown side (*h*), and the latter on the plea side (*i*), of the court. The jurisdiction on the Crown side of the court will be considered hereafter (*k*): but on its plea side, the court exercised (though originally by usurpation grounded on a legal fiction) (*l*) a general jurisdiction and cognizance of all actions between subject and subject, excepting only matters affecting the revenue of the Crown, which last mentioned matters were assigned to the Court of Exchequer, and excepting also matters appertaining to the realty, which were within the exclusive jurisdiction of the Court of Common Pleas (*m*).] And from the judgments of the King's Bench, proceedings by way of error lay ultimately to the House of Lords, there having been an intermediate appeal to the *Exchequer Chamber*, a court which had been originally constituted as a court of error for the Court of

(*h*) 6 & 7 Vict. (1843), c. 20; 23 & 24 Vict. (1860), c. 54; the Crown Suits Act, 1865 (28 & 29 Vict. c. 104); and the Crown Office Rules, 1886.

(*i*) Chief Justice's Pension Act, 1825.

(*k*) *Vide post*, bk. VI., ch. X.

(*l*) This usurpation of the Court of King's Bench orginated as follows:—The jurisdiction of the court in civil actions was formerly confined to actions of trespass or other injury, committed *vi et armis*, and to civil actions (other than actions real), in which the defendant was an officer of the court, or was in the custody of the marshal of the court. In order to extend the jurisdiction to actions against *any* defendant, the fiction was invented of *surmising* that the defendant had committed a breach of the peace in Middlesex, or any other county in which the court sat, and in which it was consequently held to possess an extraordinary criminal jurisdiction; and by aid of this false suggestion, a writ, called a bill of Middlesex, or a writ of *latitat* founded on a bill of Middlesex (as the case might be), was issued against him, by virtue of which he was *supposed to be committed to the custody of the marshal*, so as to bring him within the jurisdiction of the court. To this was added, under the *ac etiam* clause, the ground of action which it was the real intention of the parties to try.

(*m*) The King's Bench originally retained the superintendence of the other two superior courts of common law; and after judgment given by either of these, recourse might be had to it to correct any error of *law* in the proceedings. But this superintendence was

Exchequer, by the 31 Edw. III. (1357), st. 1, c. 12, but which was afterwards remodelled by the Law Terms Act, 1830, s. 8, whereby it was constituted a court of error from the judgments of all the three superior courts of common law; the judges of the Court being the judges of the three superior courts, other than of the court whose judgment was to be revised.

III. *The Court of Common Pleas (otherwise called the Court of Common Bench).*—This Court took cognizance of all actions between subject and subject, including real actions, and actions appertaining to the realty. Over real actions (properly so called), this Court exercised originally an *exclusive* jurisdiction, including fines and recoveries, while those modes of assurance existed, and the forms of conveyance by deed acknowledged which were afterwards substituted for them (*n*); and, in modern times, it was entrusted also with an exclusive jurisdiction in election matters, including all matters arising under the Parliamentary Elections Act, 1868 (*o*), or under the Corrupt Practices (Municipal Elections) Act, 1872 (*p*). From the judgments of this court, proceedings in error lay, primarily to the Exchequer Chamber, and ultimately to the House of Lords.

IV. *The Court of Exchequer.* — This court was at first intended principally to order the revenues of the Crown, and to recover the king's debts and duties (*q*), though it afterwards acquired (by usurpation grounded on a legal fiction) (*r*) the additional character of an

taken from it by the Law Terms Act, 1830, s. 8.

(*n*) 4 Inst. 99.

(*o*) 31 & 32 Vict. c. 125.

(*p*) 35 & 36 Vict. c. 60.

(*q*) 4 Inst. 103—116; *Attorney-General* v. *Sewell* (1838), 4 M. & W. 77.

(*r*) This usurpation of the Court of Exchequer originated as follows. According to its original constitution, it was the duty of this court to call the king's farmers and debtors to account; and these farmers and debtors were privileged, in their turn, to sue and implead in the same court all

ordinary court of justice between subject and subject. Down to comparatively modern times the Exchequer (regarded as a Court of Justice) was both a court of equity and a court of common law: but, by the Court of Chancery Act, 1841, the equitable jurisdiction of the court was transferred to the Court of Chancery, while its business as a *collector* of revenue was transferred to the *Queen's* (now *King's*) *Remembrancer* in the Exchequer (*s*). The Court of Exchequer, therefore, when the Judicature Acts came into operation, consisted of a *revenue* side and a common law (or *plea*) side. On its revenue side, it ascertained and enforced the proprietary rights of the Crown against the subjects of the realm (*t*); while on its plea side, it administered redress between subject and subject, but without any jurisdiction either in *dower* or in *quare impedit*, which two latter actions belonged to the Court of Commons Pleas exclusively. From the judgments of the Exchequer, proceedings in error lay primarily to the Exchequer Chamber, and ultimately to the House of Lords.

persons owing them money. For this purpose, they resorted to a writ called a *quo minus*, in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens existit* ("by which he is the less able") to pay the king his debt or rent. By gradual connivance, this *surmise* of being debtor to the king was allowed to be inserted by plaintiffs who were not in fact debtors to the king at all, and came to be considered as mere words of course, so as to open the court to litigants generally. Moreover the same fiction was permitted on the equity side of the court. And when the writ of *quo minus* was abolished, by 2 & 3 Will. 4 (1832), c. 39, the new method which was then substituted, gave a direct and proper jurisdiction to this court, in matters of private debt generally.

(*s*) *Attorney-General* v. *Halling* (1846), 15 M. & W. 687. By the Queen's Remembrancer's Act, 1859, (22 & 23 Vict. c. 21), and the Probate Duty Act, 1861, the office of Queen's (now King's) Remembrancer was regulated, and the practice and procedure on the revenue side of the Court of Exchequer were amended. (See General Rules, 7 H. & N. 505.)

(*t*) Crown Suits Act, 1865; Judicature Act, 1881; Ord. LXVIII. (1883), rr. 2, 3 and 4; and the Crown Office Rules, 1886.

[V. *The High Court of Admiralty.*—This court had jurisdiction to try and determine all *maritime* causes, that is to say, all injuries committed on the high seas; and, generally speaking, and with the exception of any case otherwise provided for by Act of Parliament (*u*), all causes so triable must have been causes arising *wholly* upon the sea, and not within the precincts of any county, the statute 15 Ric. II. (1391), c. 3, having declared, that the court of the admiral should have no manner of cognizance of any contract or of anything done within the body of any county, either by land or by water (*x*). The court therefore had no jurisdiction in wreck of the sea, for that must be cast on land before it becomes a wreck; but it had jurisdiction as regards *flotsam*, *jetsam*, and *ligan*, and also (under the provisions of particular statutes) with regard to *salvage*. When part of a contract (or other cause of action) arose upon the sea, and part upon the land, the common law jurisdiction excluded the admiralty jurisdiction (*y*); and therefore, though purely maritime acquisitions, which are earned and become due wholly on the high seas—as seamen's wages—fell properly within the admiralty jurisdiction, even when the contract for them was made upon land (*z*), yet, in general, if a contract were made in England (*e.g.*, a charter-party) but to be executed on the seas, or if a contract (*e.g.*, a bond to pay money) were made upon the seas, but to be performed in England, these contracts belonged not to the admiralty jurisdiction, but to the courts of common law (*a*). It is to be observed, however, that where the admiralty jurisdiction extended to the original subject-matter in the cause, the jurisdiction extended also to all consequential questions; though these latter might otherwise have been

(*u*) Admiralty Court Act, 1840.

(*x*) As to what is *intra corpus comitatûs*, see Com. Dig. *Admiralty* (E. 14); Jac., Law Dict. *Admiral.*

(*y*) Co. Litt. 261.

(*z*) 1 Ventr. 146.

(*a*) *Bridgeman's Case*, Hob. 11; Hale, *Hist. C. L.* 35; *Le Caux* v. *Eden* (1781), Doug. 594.

[properly determinable at the common law (*b*). Thus, a suit for beaconage (the beacon standing on a rock in the sea) might have been brought in the admiralty, the admiral having an original jurisdiction over beacons (*c*).] In addition to its general jurisdiction over maritime causes, the Court of Admiralty (under a special commission in that behalf) adjudicated also on *prize of war* (*d*); and (when the matter was specially referred to it by the Crown (*e*)) on *booty of war*. The Court adopted, in its practice, many of the principles of the civil law; and also, as occasion required, made use of the Rhodian laws, and the laws of Oleron—bodies of law derived respectively from the island of Rhodes in the Mediterranean, and the island of Oleron in France (*f*). From the sentence of the admiralty judge, an *appeal* used to lie, in general, to the Court of Delegates, when that tribunal existed; and from certain of the "vice-admiralty courts" (that is to say, courts with an admiralty jurisdiction established in British possessions beyond the seas), appeals might be brought either before the Court of Admiralty in England, or before the King in Council. [But in the particular case of prize vessels taken in time of war in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lay to certain commissioners, called Lords Commissioners in Prize Cases. And this was by virtue of divers treaties with foreign nations, by which, courts were established in all the maritime countries of Europe, for the decision of this question, "whether lawful prize or not"; for, that being

(*b*) 13 Rep. 53; *Ridly* v. *Eggles-field* (1671), 2 Lev. 25; *Spark* v. *Stafford* (1661), Hardr. 183.

(*c*) *Crosse* v. *Diggs* (1663), 1 Sid. 158.

(*d*) 2 Chit. *Gen. Pr.* 538a; *Lindo* v. *Rodney* (1782), Doug. 613 (n); *Mitchell* v. *Rodney* (in error) (1783), 2 Bro. P. C. 423; *Faith* v. *Pearson* (1816), 6 Taunt. 439.

(*e*) Admiralty Court Act, 1840, s. 22; *The Banda and Kirwee Booty* (1866), L. R. 1 Adm. & Ecc. 109.

(*f*) Hale, *Hist. C. L.* 36; Co. Litt. 11.

[a question between subjects of different states, it belonged entirely to the law of nations, and not to the municipal laws of any one country to determine it.] However, by the Privy Council Appeals Act, 1832, the appellate jurisdiction of the court of delegates was transferred to the king in council ; and, by the Judicial Committee Act, 1833, appeals in prize suits, and in other proceedings in the admiralty or vice-admiralty courts, or in any other court abroad, which might at the date of that Act have been made either to the High Court of Admiralty or to the Lords Commissioners in Prize Cases, were directed in future to be made to the king in council. By the statute last named, as amended by the Judicial Committee Acts, 1843 and 1844, the Privy Council was empowered to refer all such appeals to the Judicial Committee thereof; and although the Privy Council Appeals Act, 1832, s. 2, has been repealed by the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), the right of appeal to the Privy Council remains unaffected, and by the Judicature Act, 1891, s. 4, it is expressly enacted, that the High Court of Justice (Admiralty Division) shall be a Prize Court within the meaning of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), and shall have all the jurisdiction of the Court of Admiralty, and that the appeal therefrom shall be to the Privy Council.

VI. and VII. Regarding the Court of *Bankruptcy*, the Court of *Probate*, and the Court for *Divorce and Matrimonial Causes*, it is sufficient here to barely mention them, as they have been elsewhere sufficiently noticed already (*g*).

Such having been the several courts which, under the Judicature Acts before referred to, have been united and consolidated together in the High Court of Justice, we shall now proceed briefly to describe the judges who presided over them, at the date of such union and consoli-

(*g*) *Vide sup.* vol II. pp. 189, 231, 327.

dation. And, First, with regard to the Court of Chancery, we have already said enough regarding the judges of that court. But, Secondly, with regard to the Courts of King's Bench, Exchequer, and Common Pleas, which were usually described collectively as "the Superior Courts of Common Law," or, as "the Courts at Westminster," they were each presided over by a chief justice (called in the Court of Exchequer the Chief Baron); and comprised, in addition, certain "puisne" judges, who, in the Court of Exchequer, were designated "Barons." All of these judges taken collectively were popularly called the *judges of the land*, or simply *the judges;* and they were of high dignity and precedence, taking rank before baronets, and being the constitutional advisers of the House of Lords in matters of law. The number of them varied at different periods of our legal history (*h*); it remained fixed for a long period at twelve, but (in consequence of the increase of business) an additional judge was appointed, at the beginning of the reign of William the Fourth, to each of the three courts (*i*). And by the Parliamentary Elections Act, 1868, a further increase in their number was authorized with reference to the jurisdiction (election petitions) conferred upon them by that Act (*k*). Also, by the 30 & 31 Vict. (1867), c. 68, certain parts of the business of the courts which used to be disposed of by the judges sitting in chambers, were directed to be dealt with (in the first instance, and subject to an appeal to the judge) by the *Masters* of the courts under general rules issued for that purpose (*l*). These judges were all created by letters

(*h*) Dugd. *Orig. Jurid.* ch. 18.

(*i*) Law Terms Act, 1830, ss. 1, 2.

(*k*) 31 & 32 Vict. c. 125, s. 11.

(*l*) The business which can be transacted by the Masters for the judges now depends upon Ord. LIV. (1883), rr. 11 and 12; and it includes everything that can be transacted by a judge at chambers, with certain specified exceptions. It may be noticed, that, by the Judicature (Officers) Act, 1879, and Ord. LIV. (1883), rr. 13—16, the offices of the Masters of the Supreme Court have been rearranged on a fresh basis, and a Central Office has been established, which office is placed under the joint control of the Masters.

patent ; and by the Act of Settlement they were made irremovable, *quamdiu bene se gesserint*, except upon the address of both houses of parliament. The title of the chief judge of the Court of King's Bench was the "Lord Chief Justice of England," and he had a salary of 8,000*l.* a year ; while the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer of Pleas, had each a salary of 7,000*l.* a year, the other judges of the three superior courts of common law having an uniform salary of 5,000*l.* a year each. Thirdly, with regard to the High Court of Admiralty, that court was presided over by a judge appointed by the Crown, who formerly sat as the Lord High Admiral's deputy, and who also (but by virtue of separate commissions) presided over the Prize Court. Lastly, the Court of Bankruptcy was presided over by one of the Vice-Chancellors of the Court of Chancery ; and the Court of Probate and the Court of Divorce and Matrimonial Causes were presided over, respectively, by the "Judge of the Probate Court," as established by the Court of Probate Act, 1857, and (except at the sittings of the full Court of Divorce) by the "Judge Ordinary," as established by the Matrimonial Causes Act, 1857, in manner formerly mentioned.

Such having been the different courts, and the judges of the different courts, out of which his Majesty's High Court of Justice was composed, it is to be remembered, that the High Court forms one of two permanent divisions of the Supreme Court of Judicature, the other division being the Court of Appeal ; and the remainder of this chapter will be devoted to a consideration of these two divisions of the Supreme Court in their order.

First, *the High Court of Justice.*—This court is constituted a superior court of record ; and to it is transferred the jurisdiction which, when the Judicature Acts came into operation, belonged to the superior courts of which

we have already spoken, and also the common law jurisdiction which at the same date belonged to the Palatinate Courts of Lancaster and Durham, and the jurisdiction appertaining to all commissions of assize, of oyer and terminer, and of gaol delivery. Of the palatinate courts, and of the assize courts, some account may be here desirable.

The Palatinate Courts.—In the counties palatine of Lancaster and Durham, there were, at the date of the Judicature Acts, courts both of law and of equity, held before the respective chancellors of those counties palatine, or before judges specially commissioned for that purpose (*m*); and these courts were formerly exempt from the ordinary process of the courts at Westminster. Even after these counties palatine were re-united in the Crown, the maxim still continued to prevail, that the ordinary writs ran not into a county palatine: and, therefore (until a recent period), all process issuing out of the superior courts at Westminster, and intended to be executed in either of those counties, used to be directed in the first instance to the chancellor thereof, who thereupon issued his mandate to the sheriff. And though the judges of assize went into the counties palatine, and tried causes depending in the courts there, they sat by virtue of a

(*m*) 4 Inst. 213, 218; Finch, L. 452. It may be useful to mention here, that there was also a court called *The Court of the Duchy Chamber of Lancaster*. This court had a concurrent jurisdiction with Chancery as to matters in equity relating to lands holden of the Crown in right of that duchy (*Owen* v. *Holt*, Hob. 77; *Fisher* v. *Patten* (1671), 2 Lev. 74), which, as Blackstone (vol. iii. p. 78) remarks, is a thing very distinct from the *county palatine* of Lancaster, inasmuch as the duchy includes much territory at a distance from the county palatine, and particularly a very large district surrounded by the city of Westminster. And there still are the *Barmote* Courts, for deciding questions of title and other matters relating to mines, in certain mining districts (in Derbyshire) belonging to the duchy of Lancaster. (See 14 & 15 Vict. (1851), c. 94; and Bainbridge, *Mines*, 5th ed., pp. 153, 154.)

special commission from the Crown in its capacity of owner of the franchise, and under the seal of the chancellor thereof, and not by the usual commission under the Great Seal of England. But it formed one of the provisions of the Judicature Acts, that henceforth the counties palatine of Lancaster and Durham should respectively cease to be counties palatine, *so far as regards the issue of special commissions of assize or other like commissions*, but not further or otherwise (*n*) ; and that commissions might be issued for the trial of all causes and matters within such counties respectively, in the same manner in all respects as in any other counties of England and Wales (*o*). And all the jurisdiction which, at the time when the Judicature Acts came into operation, was vested in or capable of being exercised either by the Court of Common Pleas at Lancaster or by the Court of Pleas at Durham, was transferred to the High Court (*p*) ; but the Chancery (or equity) jurisdiction of either county palatine was not affected by the Acts (*q*), and the equity jurisdiction therefore still remains,—for Lancashire in the Lancaster Chancery Court, and for Durham in the Durham Palatinate Court.

The Assize Courts.—These are constituted of two or more commissioners, usually called judges of assize, who are sent, by special commission from the Crown, on *circuits* all over the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the High Court of Justice ; there being, however, as to London and Middlesex, this exception, that instead of their being comprised within any circuit, courts for the trial of issues of fact by a jury are held there, before one or more of the judges of the High Court, four times in every year, at what are called the

(*n*) Judicature Act, 1873, s. 99.
(*o*) *Ibid.*
(*p*) Sect. 16.
(*q*) See Court of Chancery (Lancaster) Act, 1850 ; *In re Alison's Trusts* (1878), 8 Ch. D. 2.

London and Middlesex *sittings* (*r*). [These judges of assize came into use in the room of the antient justices in eyre (*justiciarii in itinere*), who were regularly established by the Council of Northampton, A.D. 1176 (*s*), and afterwards, by *Magna Carta*, c. 12, they went into every county once a year. In our own day, the commissioners of assize consist of the judges of the High Court of Justice, to whom the duty is confided of superintending the trial of matters of fact at the assizes, and incidentally of deciding matters of law and transacting other judicial business there.

The justices or commissioners of assize, as originally appointed under the Statute of Westminster the Second, in 1285, were directed to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county; and by the 27 Edw. I. (1299), c. 4, (explained by the 12 Edw. II. (1317), c. 3,) assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought, associating to himself one knight or other approved man of the county. But by the 14 Edw. III. (1340), st. 1, c. 16, inquests of *nisi prius* might be taken before *any* justice of either bench, (though the plea were not depending in his own court,) or before the chief baron of the Exchequer, if he were a man of the law, or otherwise before the justices of assize, so that one of such justices should be a judge of the King's Bench or Common Pleas, or the king's serjeant sworn;] and latterly, all justices of assize were empowered, on their respective circuits, to try causes pending in the Court of Exchequer, without any separate

(*r*) Ord. LXIII. (1883), r. 1; 54 & 55 Vict. c. 14 (Judicature (London Causes) Act, 1891). The London sittings were formerly held at the Guildhall, but the judges no longer sit there. They now sit at the Royal Court of Justice, and a jury for the city of London is specially summoned there, periodically, to try actions set down for trial in the London list.

(*s*) Seld. *Jan.* l. 2, s. 5; Spelm. *Cod.* 329.

commission issuing from the Exchequer for the purpose (*t*). Under the Judicature Acts, his Majesty is empowered by commission of assize,—or by any other commission, either general or special,—to assign to any judge or judges of the High Court of Justice, or to other the persons usually named in commissions of assize, the duty of trying issues either of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the High Court ; and while engaged in the exercise of this jurisdiction, the commissioners constitute a court of the High Court, and have all the powers of the High Court (*u*).

Formerly, no man of law could be judge of assize in his own county, wherein he was born or did inhabit (*x*) ; but, in modern times, this prohibition, always inconvenient, was deemed unnecessary, and, by the 12 Geo. II. (1738), c. 27, and 49 Geo. III. (1809), c. 91, it was abolished (*y*).

The commissions or authorities which are applicable to civil cases are, the commissions of *assize* and the statutory authority of *nisi prius*, the commission of *assize* being

(*t*) 2 & 3 Vict. (1839), c. 22.

(*u*) Judicature Act, 1873, s. 29. County Court judges are, by the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 7, and by the County Courts Act, 1888, s. 16, authorized to be included in the commission, just as king's counsel are by the 13 & 14 Vict. (1850), c. 25.

(*x*) Stat. 4 Edw. 3 (1330), c. 2 ; 8 Ric. 2 (1384), c. 2 ; 33 Hen. 8 (1542), c. 24.

(*y*) The 23rd section of the Judicature Act, 1875 (38 & 39 Vict. c. 77), enables the Crown to regulate circuits by Order in Council ; and such orders were accordingly issued, dated 5th February and 17th May, 1876, and 26th June, 1884, constituting the following circuits :— the Northern, the North Eastern, the Midland, the South Eastern, the Oxford, the Western, and the North and South Wales circuits. With regard to the county of *Surrey*, that county was not to be included in any circuit, but commissions were to be issued, for the discharge of civil and criminal business therein, not less often than twice in every year ; but this county has now been included in the South Eastern Circuit (see Order in Council, 28th July, 1893). See also the Winter Assizes Act, 1876 (39 & 40 Vict. c. 57) ; the Winter Assizes Act, 1877 (40 & 41 Vict. c. 46) ; and the Spring Assizes Act, 1879 (42 & 43 Vict. c. 1).

named after the real actions once in use, but now abolished, and the authority of *nisi prius* (exercised under the Statute of Westminster the Second) having reference to all other actions; and the commissions which are applicable to criminal cases are, the commissions *of the peace, of oyer and terminer, and of gaol delivery.* With regard to the authority of *nisi prius*, it is to be known, that all questions of fact used to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arose, "*unless sooner*" (*nisi prius*) the judges of assize should come into the county in question: but, by the effect of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the course of proceeding in civil causes was then made no longer even ostensibly connected with this *nisi prius* proviso, the trial being allowed to take place, as a matter of course, before the judges of assize.

Such being the constitution of the High Court of Justice, it is for the more convenient despatch of business subdivided into the following divisions, that is to say:—the Chancery Division; the King's Bench Division (now comprising, in addition to the original division of that name, the Common Pleas Division and the Exchequer Division); and the Probate, Divorce and Admiralty Division. We shall deal briefly with each of these divisions in its order.

I. *The Chancery Division.*—Of this Division, the Lord Chancellor is president; and the other judges thereof included originally the Master of the Rolls and the Vice-Chancellors (*z*), and now include their respective successors,—excepting that the Master of the Rolls (as a judge) is

(*z*) Judicature Act, 1873, s. 31; 1881, s. 5. By the Act of 1877, s. 2, an additional judge of the High Court was appointed; and by the Act of 1881, s. 6, the power of appointing such additional judge was perpetuated. There are now six ordinary judges of the Chancery Division.

now a judge exclusively of the Court of Appeal (*a*), and that the other judges are no longer called Vice-Chancellors. To this Division is assigned such business (in general) as would, before the Judicature Acts, have belonged to the Court of Chancery.

II. *The King's Bench Division.*—Of this Division, the Lord Chief Justice of England is president; and to it is assigned such business (in general) as would have, previously, belonged to the Court of King's Bench, and to the Courts of Common Pleas and Exchequer, and to the Courts of Common Pleas at Lancaster and Durham.

By an Order in Council, dated the 16th December, 1880, the Common Pleas and Exchequer Divisions of the High Court were consolidated into one Division, called the King's Bench Division; and the Lord Chief Justice of England has (in addition to his former powers as such) all the powers of the late Chief Justice of the Common Pleas, and of the late Chief Baron of the Exchequer (*b*).

III. *The Probate, Divorce, and Admiralty Division.*—Of this Division, the person who used to fill the joint offices of judge of the court of probate and judge ordinary of the Court for Divorce and Matrimonial Causes (or his successor) is president; and the other judge is the judge of the former Court of Admiralty (or his successor). To this Division is assigned such business (in general) as would before the Acts have belonged to the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Court of Admiralty respectively (*c*).

IV. *Bankruptcy.*—By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 93, the London Court of Bankruptcy was united and consolidated with the Supreme Court of Judicature, and its jurisdiction transferred to the High Court of Justice. The jurisdiction is now exercised by a

(*a*) Act of 1881, s. 2.
(*b*) *Ibid.* s. 25.
(*c*) Act of 1873, ss. 31, 34.

judge of the King's Bench Division specially assigned for it (*d*).

The plaintiff may, within certain limitations, choose the Division in which he will take proceedings; but an order of court, transferring the proceedings from one Division to another, may at any time be made, either upon or without any application of the parties (*e*). Also, although every action and proceeding in the High Court must, so far as practicable, be disposed of before a single judge, constituting in his own person a court of the High Court, —and (so far as regards the proceedings therein subsequent to the hearing or trial) before the judge before whom such hearing or trial took place (*f*),—still there are certain classes of business which must take place before a *Divisional Court* of the High Court, consisting of two or three judges of the High Court (*g*).

Secondly, *the Court of Appeal.* — This Court was intended to supersede all the courts of appeal which were previously in force; and it will therefore be convenient to notice, firstly, the old system of appeals. Now appeals under the old system were as follows. In the case of most of the inferior courts of civil jurisdiction, the appeal, in a matter of *law*, was to the King's Bench exclusively, and in a matter of *equity*, to the Court of Chancery, and in a matter of *admiralty* to the Court of Admiralty; and the appeal from a county court having jurisdiction in bankruptcy, was to the chief judge in bankruptcy, and from the provincial *ecclesiastical* courts, the appeal was to the Privy Council. The appeal from the superior courts of common law and of equity, and the Court of Admiralty, was to the Court of Exchequer Chamber, to the Court of Appeal in Chancery, or to the Privy Council, respectively, according to the distinctions already set forth; and in

(*d*) Bankruptcy Act, 1883, s. 94.

(*e*) See Act of 1873, s. 36; Ord. XLIX. r. 1 (1883), and r. 4a (December, 1885); and Bankruptcy Act, 1883, s. 6.

(*f*) Act of 1890, s. 2.

(*g*) Acts of 1873, s. 45; 1876, s. 17; and 1884, s. 4.

Bankruptcy, the appeal was to the Court of Appeal in Chancery. From the Chancery of the County Palatine of Lancaster, the appeal was to the Chancellor of that Duchy sitting with the Court of Appeal in Chancery (*h*); and from the Court of Appeal in Chancery and from the Court of Exchequer Chamber, an ultimate appeal lay, in general, to the House of Lords. Under the Judicature Acts, all appeals from petty or quarter sessions, from a county court, or from any other inferior court, which might previously have been brought to any court or judge whose jurisdiction is transferred to the High Court, are now to be heard and determined by a *divisional court* of the High Court (*i*), whose determination is in general final (*k*). And all the appellate jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, and of the Court of Appeal in Chancery of the County Palatine of Lancaster (*l*), and of the Court of the Lord Warden of the Stannaries, and of the Court of Exchequer Chamber (*m*), have been transferred to the Court of Appeal created by the Judicature Acts; while under the Liverpool Court of Passage Act, 1893, section 10, appeals from the Liverpool Court of Passage (*n*), and under the Palatine Court of Durham Act, 1889, appeals from the County Palatine of Durham are now also to the Court of Appeal, although formerly the appeal from the Palatinate Court was to the House of Lords direct.

Of the Court of Appeal thus constituted, the Lord Chancellor is the president (*o*); and every ex-Lord Chancellor is *ex officio* a judge thereof, although not obliged to sit (*p*). In addition, there used to be four

(*h*) Lancaster (Court of Chancery) Act, 1854; and see Act, 1890, ss. 3, 4.

(*i*) Judicature Act, 1884, s. 4; and Ord. LIX. (1883), rr. 1—4.

(*k*) Act of 1873, s. 45.

(*l*) Lancaster (Court of Chancery) Act, 1890, s. 4.

(*m*) Act of 1873, s. 18; *Re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 153.

(*n*) *Anderson* v. *Dean*, [1894] 2 Q. B. 222. The procedure in the Court of Passage has been amended by the Liverpool Court of Passage Act, 1896.

(*o*) Judicature Act, 1875, s. 6.

(*p*) Act of 1891 (c. 53), s. 1.

other *ex officio* judges, viz., the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer (*q*). But, by the Supreme Court of Judicature Act, 1881, the Master of the Rolls ceased to be an *ex officio* judge, and became an ordinary judge, of this court (*r*) : and the president for the time being of the Probate, Divorce, and Admiralty Division was made an *ex officio* judge thereof (*s*). There are also five other ordinary judges of this court, all of whom are styled "lords justices of appeal" (*t*).

To the Court of Appeal as thus established was assigned (besides the other appeals already referred to) every appeal from a divisional court of the High Court, or from any judgment or order of the High Court, or of any judge or judges thereof (*u*) ; but it was afterwards provided by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20, that no appeal from a divisional court of the High Court should lie to the Court of Appeal, where the decision of the High Court, or of its predecessor the Superior Court, was by statute declared to be final (*x*). Also, under the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1, motions for new trials, which used to be made in the first instance to a divisional court of the High Court, are now in all cases made direct to the Court of Appeal ; and under the Judicature Act, 1894 (57 & 58 Vict. c. 16), all appeals from orders of a judge, in matters of practice and procedure, are to be made to the Court of Appeal, the number of appealable orders being, however, now greatly reduced by that Act.

(*q*) Act of 1875, s. 4.

(*r*) Act of 1881, s. 2.

(*s*) Sect. 4 ; Act of 1891 (c. 53), s. 2.

(*t*) Appellate Jurisdiction Act, 1876, s. 15 : Act of 1877, s. 4.

(*u*) Act of 1873, s. 19 ; *Walsall Overseers* v. *L. & N. W. Rail. Co.* (1878), 4 App. Ca. 30 ; *Corporation of Peterborough* v. *Wilsthorpe Overseers* (1883), 12 Q. B. D. 1.

(*x*) Act of 1881, s. 14 ; *Lady Sandhurst's Case* (1889), 23 Q. B. D. 79.

CHAPTER V.

OF THE ULTIMATE COURTS OF APPEAL.

It was one of the objects of the Judicature Act, 1873, to abolish the appellate jurisdiction which, as we have seen, formerly resided in the House of Lords and the Judicial Committee of the Privy Council. So far as the House of Lords was concerned, the Act of 1873 professed actually to abolish the appellate jurisdiction (*a*) ; and it made provision for the taking of a similar step by Order in Council, in the case of the Judicial Committee (*b*). But, before the Act of 1873 came into operation, these provisions were suspended by the Judicature Act, 1875 (*c*) ; and they were afterwards entirely repealed by the Appellate Jurisdiction Act, 1876 (*d*). The jurisdictions of the House of Lords and the Judicial Committee, as ultimate Courts of Appeal, remain, therefore, intact.

I. *The House of Lords.*—It is expressly provided by the Appellate Jurisdiction Act, 1876 (*e*), that an appeal shall lie to the House of Lords from any order or judgment, either of the Court of Appeal in England, or of any of the Scotch or Irish Courts, from which error or an appeal lay thereto at or immediately before the commencement of the Act, that is to say, 1st November, 1876 ; and that such appeal shall be brought by way of *petition*, praying that the matter of the order or judgment appealed against may be reviewed before his Majesty the King in his Court of Parliament, in order that the said court may

(*a*) 36 & 37 Vict. c. 66, s. 20.
(*b*) *Ibid.* s. 21.
(*c*) Sect. 2.
(*d*) Sect. 24.
(*e*) 39 & 40 Vict. c. 59, s. 3.

determine "*what of right, and according to the custom of* "*this realm, ought to be done in the subject-matter* "*thereof*" (*f*). In theory, every member of the House of Lords has a right to be present and vote at the hearing of an appeal: but it is provided by the Act that no appeal may be heard and determined, unless there be present not less than three specially qualified peers, known as Lords of Appeal. This class of peers comprises:—the Lord Chancellor; the Lords of Appeal in Ordinary (presently to be mentioned); and such peers as have held *high judicial office* (*g*).

With regard to the Lords of Appeal in Ordinary, it is enacted, by the Appellate Jurisdiction Act, 1876, that, in order to aid the House of Lords in the hearing and determination of appeals, his Majesty may appoint by patent two qualified persons (*h*), who shall hold office during good behaviour and notwithstanding the demise of the Crown, but who shall be removable on the address of both Houses of Parliament. Each of such Lords of Appeal is entitled during life to rank as a baron, and, even after his retirement or resignation (*i*), to a writ of summons to attend, and to sit and vote, in the House of Lords; but his dignity is not hereditary (*k*), though his children are entitled to be called Honourable. And for the purpose of hearing appeals, and to prevent delay in the administration of justice, it is further provided, that the House of Lords may sit as a court of appeal during the prorogation of parliament, and even during the dissolution of parliament,

(*f*) Sect. 4.

(*g*) That is to say, the Lord Chancellorship of Great Britain or of Ireland, a paid judgeship of the Judicial Committee, a judgeship of the High Court of Justice, or of the Court of Appeal, and the like. (Sects. 5, 25.)

(*h*) The qualification consists in having held "high judicial office" for not less than two years, such office being as defined in sect. 25 of the Appellate Jurisdiction Act, 1876, as amended by sect. 5 of the Appellate Jurisdiction Act, 1887; or having been for not less than fifteen years a practising barrister in England or Ireland, or a practising advocate in Scotland. (Sect. 6.)

(*i*) Appellate Jurisdiction Act, 1887, s. 2.

(*k*) Act of 1876, s. 6.

should his Majesty think fit, by writing under his sign manual, to authorize the Lords of Appeal to hold sittings during such dissolution (*l*). The Act also substitutes the proceeding by way of appeal for the proceeding by way of error, which latter it wholly abolishes (*m*); and the period of one year (instead of five years as formerly) is the time limited for bringing the appeal. The House of Lords may now, in a proper case, call in *assessors* (*n*).

II. *The Judicial Committee.*—It will be remembered, that, by the Judicial Committee Act, 1871, his Majesty was enabled to appoint four judges as paid members of the judicial committee (*o*); and the appointment of, and the tenure of office by, these four judges, were the same as those just mentioned with regard to the Lords of Appeal. But the Appellate Jurisdiction Act, 1876, provides for the gradual substitution of additional Lords of Appeal for these paid members of the judicial committee; and directs that, subject to the due performance of his duties with regard to appeals in the House of Lords, it shall be the duty of a Lord of Appeal, if a privy councillor, to sit and act also as a member of the judicial committee (*p*). The same Act also provides, that his Majesty by order in council, with the advice of the judicial committee or any five of them (the Lord Chancellor being one), and of the archbishops and bishops who are members of the privy council (or any two of them), may make rules for the attendance, as *assessors* of the committee on the hearing of ecclesiastical cases, of such number of the archbishops and bishops of the Church of England as may, by such rules, be determined (*q*).

(*l*) *Ibid.* ss. 8, 9.

(*m*) Standing Orders have been issued by the House of Lords, regulating the practice on appeals under this Act.

(*n*) Judicature Act, 1891, s. 3.

(*o*) *Vide sup.* vol. II. p. 474.

(*p*) Appellate Jurisdiction Act, 1876, ss. 6, 14. (Under the provisions of this Act, the number of the Lords of Appeal in Ordinary has been increased to four.)

(*q*) Sect. 14.

CHAPTER VI.

OF THE DIFFERENT SPECIES OF CIVIL INJURIES, AND OF THE REMEDIES THEREFOR, AND HEREIN OF THE REMEDY BY ACTION GENERALLY.

We shall now proceed to the examination of the different species of civil injuries, and of the remedies by action for redressing the same, it being a settled principle in the law, that every wrong must have a remedy (*a*). The remedy by action may be in the King's Bench Division of the High Court, and it is then usually called a common law action; or it may be in the Chancery Division (or in some other Division) of the High Court, when it is commonly called a Chancery action (or formerly suit), or a Probate, Divorce, or Admiralty action. A common law action differs in some respects from a chancery action, such, *e.g.*, as "an action "of foreclosure," or "of partition"; and it is therefore convenient to treat of these actions separately, commencing with the common law action, this having been the earliest action for the redress of a civil wrong. And here we will observe, once for all, and in order to obviate repetition, that though (under the Judicature Acts) many of the distinctions about to be explained have for the most part ceased to be legally recognised, yet, as they are customarily observed, information as to them is still desirable (*b*).

[The plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived; and this may be effected either by the specific delivery of the subject-matter in dispute to the

(*a*) *Ashby* v. *White* (1703), 1 Sm. Lead. Cas. 11th ed. 240.

(*b*) *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56.

[legal owner, or (where that is not possible) by making the sufferer a pecuniary satisfaction in damages. An action is, accordingly, defined by the Mirrour as being "the lawful demand of one's right" (*c*); or, as Bracton and Fleta express it in the words of Justinian, *jus prosequendi in judicio quod alicui debetur* (*d*).]

And in the first place, actions (according to an antient division) were either *personal*, *real*, or *mixed*. *Personal* actions were those whereby a man claimed the recovery of a debt or of a personal chattel, or else satisfaction in damages for some injury done to his person or property. *Real* actions,—or, as they are called in the Mirrour, *feudal* actions,—concerned real property only, and were actions whereby the plaintiff or demandant claimed the specific recovery of lands, tenements, or hereditaments; and it was by *real* actions that all disputes concerning real estates were formerly decided. But in modern times, real actions gradually became less frequent in practice, upon account of the great nicety required in their management, and the inconvenient length of their process; and a much more expeditious method of trying titles was at a later period introduced, particularly the action of ejectment, of which we shall have occasion presently to speak. Accordingly, by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 36, all real actions (with but one or two exceptions) were abolished. *Mixed* actions were suits partaking of the natures of both real and personal actions, some real property being demanded therein, together with personal damages for the wrong sustained; but they partook, in the main, of the character of real actions, were often so called (*e*), and were abolished at the same time as real actions.

On the general abolition of real and mixed actions just referred to, the *writ of right of dower*, *the writ of dower*,

(*c*) Ch. 2, s. 1.
(*d*) Inst. 4, 6.
(*e*) Co. Litt. 285 b; Roscoe, *Real Actions*, 1.

the writ of quare impedit, and the action of *ejectment* (*f*), escaped destruction. The two first of these lay where the demandant claimed lands or tenements by the particular title of dower: the first of them being applicable, where the woman was endowed of part of her dower, and was deprived of the residue, lying in the same town, by the same tenant by whom she was endowed of part (*g*), and the second being proper in all other cases where she was entitled to dower (*h*). The action of *quare impedit* lay where the right to present to a benefice had been disturbed, the object of the action being to recover the presentation. And the action of *ejectment* lay, where lands or tenements were unlawfully withheld, the object of the action being the recovery of the possession. All these actions were however, abolished by the Common Law Procedure Act, 1860, s. 26, except the action of ejectment, which had been remodelled by the Common Law Procedure Act, 1852. Since the Jurisdiction Acts, the action of ejectment is commenced like an ordinary action (*i*).

Personal actions are actions founded either on *contracts* or on *torts;* that is to say, they are either actions *ex contractu* or actions *ex delicto*, torts being wrongs independent of contract, and being either (1) *nonfeasances*, or the omission of acts which a man was by law bound to do, or (2) *misfeasances*, or the improper performance of lawful acts, or (3) *malfeasances*, or the commission of acts which were themselves unlawful (*k*). The forms of personal actions which were latterly recognized were eight, viz.: *debt*, *covenant*, *assumpsit*, *detinue*, *trespass*, *trover*, *trespass on the case*, and *replevin*, the three first being founded on

(*f*) Ejectment was often considered as a *mixed* action (see 3 Bl. Com. 214); and was expressly so denominated in the Real Property Limitation Act, 1833. Yet, in its form, it was a species of the personal action of trespass. (See Fitz Ab. tit. *Ejectione Firme*, 2.)

(*g*) Roscoe, *Real Actions*, 29.

(*h*) *Ibid.* 39.

(*i*) Ord. I., r. 1.

(*k*) 1 Chitty Pl. 134, 1st edit. *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56.

contract, and the remaining five on tort (*l*). And although all forms of action have been abolished, and every action is now a simple action on the case, still every personal action continues to be more or less in the nature of one or other of the eight forms of action just specified ; and it is accordingly desirable to treat of these eight in their order.

(1) *Debt* lies, where the object is the recovery of a certain sum of money alleged to be due from the defendant to the plaintiff ; (2) *Covenant*, where redress in damages is sought for the breach of an agreement entered into by *deed ;* and (3) *Assumpsit*, where damages are claimed for the breach of a promise not made by deed. On the other hand (4) *Detinue* lies, where the object is to recover a personal chattel unlawfully detained ; (5) *Trespass*, where the plaintiff claims damages for a trespass *vi et armis* (*m*), that is, for an injury accompanied with actual force, *i.e.*, a wrongful entry upon land, or a wrongful taking and keeping of personal chattels ; (6) *Trover*, where (the wrongful *taking* being waived) the plaintiff claims damages for the wrongful *keeping* (or conversion). (7) *Trespass on the case* was a form of action less antient than the rest, having apparently first come into use in the reign of Edward the Third (*n*) ; being invented under the authority of the statute *In consimili casu* (13 Edw. I.), c. 24, upon the analogy of the old form of trespass. It lay in every case (not falling within the compass of the other forms) where damages were claimed for an injury either to the person or to property,—*e.g.*, where there was

(*l*) The action of *detinue*, though founded on a *tort*,—viz., the wrongful detainer of a chattel (see *Gledstane* v. *Hewitt* (1831), 1 Cr. & J. 565),—was considered for some purposes as an action *on contract* (see *Bryant* v. *Herbert* (1878), 3 C. P. D. 389).

(*m*) In actions of trespass, the formal words *vi et armis*, and *contra pacem*, were formerly always used in the pleadings ; but the necessity for this was abolished by the Common Law Procedure Act, 1852.

(*n*) Reeves, *Hist. Eng. Law*, vol. iii. pp. 89, 243, 391.

no act immediately injurious to person or property, but there was only a culpable omission, or where the act done was not *immediately* injurious, but only by *consequence* or collaterally, in either of which two cases, no action of trespass, properly so called, would lie, but only an action on the *case*, for the damages consequent on such omission or act (*o*). Where the subject-matter was not corporeal, so that the idea of *force* was inapplicable, the remedy was likewise *case* and not *trespass*, even though the injury was by act done, and its operation was direct and immediate (*p*). (8) *Replevin* is an action of limited application, being almost invariably confined to trying the legality of a *distress* levied upon the personal chattels of the plaintiff (*q*).

Actions used also to be classed as *local* and *transitory*; the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to land, the latter on such causes of action as may take place anywhere, as in the case of trespasses to goods, batteries, and the like. Thus, real actions were always in their nature local, personal actions were for the most part transitory; and local actions must formerly, as the general rule, have been tried in the county where the cause of action arose, and by a jury of that county, while transitory actions might have been tried in any county, at the discretion (in general) of the plaintiff. In respect of a trespass to land out of the jurisdiction, no action will lie (*r*) in an English court; but where the action is transitory (as for breach of contract), the action will lie in the English courts, whether the breach were committed in England or elsewhere (*s*). The distinction between actions

(*o*) *Scott* v. *Shepherd* (1772), 2 W. Bl. 892; 1 Sm. L. C. 11th ed. 454; *Gilbertson* v. *Richardson* (1848), 5 C. B. 502.

(*p*) 1 Chitty, Pl. 143, Com. Dig. *Action, Case, Disturbance*, (A. 2).

(*q*) It lies, however, in other cases also of goods unlawfully taken. (*George* v. *Chambers* (1843), 11 M. & W. 149; *Mellor* v. *Leather* (1853), 1 El. & Bl. 619.)

(*r*) *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 603.

(*s*) *Mostyn* v. *Fabrigas* (1774), 1 Sm. L. C. 11th ed. 591.

as local or transitory has, so far as the place of trial, or "*venue*," is concerned, been abolished by the Judicature Acts ; and there are now no longer any local venues (*t*), but the venue is in every case fixed by an order of a Master (*t*). The Judicature Acts have not, however, extended the jurisdiction of the courts ; and the old rule that no action will lie for recovery of or trespass to land situate abroad still applies (*r*).

An action for damages will (in general) lie, whenever a right has been invaded or, in other words, an injury committed, although no damage has been actually sustained ; it being material to the establishment and preservation of the *right* itself, that its invasion shall not pass with impunity (*u*). Thus, an action by one commoner against another, for surcharging the common, is maintainable, although the plaintiff may not himself have turned on any cattle of his own, and can therefore have sustained no actual loss (*x*) ; and in such cases, there being no ground for awarding damages (save in vindication of the right), the plaintiff recovers some trifling sum by way of *nominal* damages, in addition to which, the defendant has in general to pay the plaintiff's costs of the action, as well as his own. But to sustain an action for damages, it is, in general, requisite, that the plaintiff shall have sustained some loss (whether actual or nominal) *of a kind proper and peculiar to himself ;* and so, where the damage is of a merely public character, affecting persons at large equally with the plaintiff, no civil action in general lies, *e.g.*, no action can in general be maintained for an encroachment on the highway, but the offender is liable to be indicted, as for a public misdemeanor. On the other hand, where the plaintiff sustains any *special* damage, he

(*t*) Order XXXVI. r. 1, as amended by the Rules of the Supreme Court, July, 1902.

(*u*) 1 Saund. by Wms. 346 b.

(*x*) *Wells* v. *Watling* (1779), 2 W. Bl. 1233 ; *Marzetti* v. *Williams* (1830), 1 B. & Ad. 426 ; *Blofeld* v. *Payne* (1833), 4 B. & Ad. 410.

has a right of action in regard to the special damage, even although the case may also amount to a misdemeanor. Thus if, by reason of a ditch dug across the highway, a man or his horse suffers any injury by falling therein, then for this particular damage, which is not common to others of the lieges, the party shall have his action (*y*). And in these cases the occurrence of the damage is portion of the very ground of the action (*z*). And so in the case of unlawful violence, designedly done to the person, though that always amounts, in contemplation of law, to a crime, yet the party injured is entitled to his civil remedy. But this distinction is to be observed, that, in case the crime committed amounts to a *felony*, the remedy against the offender for the private injury is *suspended* until the sufferer has fulfilled his duty to the public, by prosecuting the offender for the public crime ; though in the case of a mere misdemeanor, such as an assault, battery, libel, and the like, the civil remedy by action is immediately available (*a*), and is in general the alternative of the criminal proceeding (*b*). But where A.'s servant assaulted B., and was fined for the assault, B. was held entitled afterwards to sue A. himself for damages for the assault (*c*).

It is to be particularly observed, that, though an action

(*y*) 3 Bl. Com. 220 ; *Wilkes* v. *Hungerford Market* (1835), 2 Bing. N. C. 281.

(*z*) *Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503 ; *Darley Main Co.* v. *Mitchell* (1886), 11 App. Ca. 127.

(*a*) *Wellock* v. *Constantine* (1863), 2 H. & C. 146 ; *Crosby* v. *Leng* (1810), 12 East, 409 ; *White* v. *Spettigue* (1845), 13 M. & W. 603 ; *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88 ; *Ex parte Turquand* (1878), 9 Ch. D. 704 ; *Ex parte Ball* (1879), 10 Ch. D. 667 ; *Vernon* v. *Watson*, [1891] 2 Q. B. 288, per Lord HALSBURY. It is doubtful, however, whether this rule is of any practical importance, because it seems that the offender cannot, and the courts will not, now raise the point (*Wells* v. *Abrahams* (1872), L. R. 7 Q. B. 554. See 1 Sm. L. C., 11th ed., 289—90).

(*b*) Offences against the Person Act, 1861, s. 45 ; *Reg.* v. *Mahon* (1836), 4 A. & E. 575.

(*c*) *Dyer* v. *Munday*, [1895] 1 Q. B. 742.

will lie for an injury involving the infringement of a legal right, although unattended with actual damage (*injuria sine damno*), yet none can be maintained, even for loss or damage actually inflicted, unless it result from an injury, that is, from some invasion of a right, or from some breach of a duty,—a mere *damnum absque injuriâ* (or *damnum sine injuriâ*) not being actionable, even although the damage should have been maliciously occasioned (*d*). Therefore, if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminished, yet no action lies against him ; for every one may lawfully erect a mill on his own ground. But if I have a mill by prescription on my own land, and another erects a new mill, which draws away some portion of the stream from mine, so as to diminish its former power, an action for damages will lie against him ; for in such a case there is an invasion of my prescriptive right, and not damage merely (*e*). In some few cases the same injury (being regarded in a twofold character) may be the ground of two distinct actions, the damages being distinct in each, and being therefore cumulative (*f*).

A plaintiff is not entitled to recover in respect of any damage that is too *remote ;* in other words, the damage, in order to be recoverable (*g*), must flow naturally and directly from the injury committed. Thus, where the plaintiff engaged a public singer, and the defendant

(*d*) *Allen* v. *Flood*, [1898] A. C. 1 ; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587 ; *Hubbuck* v. *Wilkinson*, [1899] 1 Q. B. 86 ; *Quinn* v. *Leathem*, [1901] A. C. 495 ; and consider *Lyons and Sons* v. *Wilkins*, [1896] 1 Ch. 811 ; [1899] 1 Ch. 255.

(*e*) Bac. Ab. *Actions on the Case* (C).

(*f*) *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141.

(*g*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341 ; *Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131 ; *Bowen* v. *Hall* (1881), 6 Q. B. D. 333 ; *The Notting Hill* (1884), 9 P. D. 105 ; *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561 ; *Mowbray* v. *Merryweather*, [1895 2 Q. B. 640.

libelled her, and the plaintiff brought his action for the libel, alleging that by reason of the libel, the singer was deterred from performing in public through the apprehension of being ill-received, whereby the plaintiff lost the profits he would otherwise have gained, it was held, that the damage was too remote, and the action was not maintainable (*h*). No action lies against a judge, at least of the superior courts, in respect of any act of a judicial character, even although the plaintiff alleges malice (*i*).

The right to sue may, in general, be transferred, and that either by operation of law, or by an express assignment (*k*). Thus, the rights of action of a bankrupt pass to the trustee; and upon the death of either of the parties between whom a cause of action founded on contract has arisen, the right of maintaining such action survives, in general, to or against his executors or administrators (*l*). And to these, as well as to the trustee in bankruptcy, the right also belongs, in general, of *continuing* actions, which the deceased or the bankrupt has commenced (*m*). But an action of tort usually dies with the person (*n*), nor can a right to recover damages for a tort be assigned. But to the former part of this rule there are certain important statutory exceptions. Thus, by the 4 Edw. III. (1330), c. 7, actions may be maintained *by* executors or administrators, for trespasses to the *personal* property of the

(*h*) *Ashley* v. *Harrison* (1793), 1 Esp. 48; *Kelly* v. *Partington* (1833), 5 B. & Ad. 645; *Knight* v. *Gibbs* (1834), 1 A. & E. 43; *Green* v. *Button* (1835), Tyr. & G. 118; *Langridge* v. *Levy* (1837), 2 M. & W. 519; 4 M. & W. 337; *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407.

(*i*) *Houlden* v. *Smith* (1850), 14 Q. B. 841; *Fray* v. *Blackburn* (1863), 3 B. & S. 576; *Kemp* v. *Neville* (1861), 10 C. B. (N.S.) 523; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668.

(*k*) Judicature Act, 1873, s. 25, sub-s. (6).

(*l*) *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311; *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 C. P. 189.

(*m*) Order XVII. rr. 1—4.

(*n*) 3 Bl. Com. 302; 1 Chitty, *Pleading*, 56.

testator or intestate, and by the Civil Procedure Act, 1833, s. 2, for any injury to his *real* estate, provided the injury, in the latter case, be committed within six calendar months before, and the action is brought within one year after, the death. By the Civil Procedure Act, 1833, also, actions may be maintained *against* executors or administrators, for any wrong committed by the deceased to another, in respect of the property of the latter, whether real or personal, provided the wrong was committed within six calendar months before the death, and the action is brought within six calendar months after the executors or administrators have taken on themselves the administration (*o*). Moreover, by the Fatal Accidents Act, 1846 (commonly called Lord Campbell's Act), which has been amended by the Fatal Accidents Act, 1864, whenever the death of a person shall be caused by such wrongful act, neglect, or default as would (if death had not ensued) have entitled the party injured to maintain an action for damages, the wrongdoer may be sued for the benefit of the wife, husband, parent, or children of the person injured; and this although the death shall have been caused under such circumstances as amount in law to a felony. And the jury may, in such a case, give damages proportionable to the injury resulting from such death, to be divided among the parties for whose benefit the action is brought, in such shares as the verdict shall direct (*p*). Which last-mentioned action is, in general, brought by the executor or administrator of the deceased; but inasmuch as the action must be brought within twelve calendar months of the death, if there be no executor or

(*o*) *Kirk* v. *Todd* (1882), 21 Ch. D. 484; *Phillips* v. *Homfray* (1883), 24 Ch. D. 439; 11 App. Ca. 466.

(*p*) *Duckworth* v. *Johnson* (1859), 4 H. & N. 653; *Pym* v. *Great Northern Railway Company* (1863), 4 B. & S. 396; *The Bernina*, *Mills* v. *Armstrong* (1887), 12 P. D. 58; 13 App. Ca. 1; *Bulmer* v. *Bulmer* (1883), 25 Ch. D. 409.

administrator, or no action be brought by him or her within six months after the death, the action may be brought by all or any of the parties to be benefited by the result. The redress given under the Employers' Liability Act, 1880 (*q*), to servants in respect of certain injuries sustained by them in their employment, is available also when the injury results in death; and, in like manner, the compensation which is recoverable under the Workmen's Compensation Acts, 1897 and 1900 (*r*).

(*q*) 43 & 44 Vict. c. 42.

(*r*) 60 & 61 Vict. c. 37; 63 & 64 Vict. c. 22.

CHAPTER VII.

OF THE DIFFERENT SPECIES OF CIVIL INJURIES, AND THEIR REMEDIES.

We shall now proceed to consider the application of the remedy by action to the various civil injuries; and as rights were diversely divided into personal rights, rights of property, rights in private relations, and public rights, it will be convenient to regard civil injuries according to the like divisions.

First, Injuries affecting Personal Rights.

Injuries affecting *life* are not merely civil wrongs, but in certain circumstances may be crimes. It has already been pointed out that in certain cases the law gives damages for the death of the injured person, viz.:—(1) under the Fatal Accidents Act, 1846 (Lord Campbell's Act); (2) under the Employers' Liability Act, 1880; and (3) under the Workmen's Compensation Acts, 1897 and 1900. These Acts have, however, been sufficiently considered, the first of them in the preceding chapter, and the other two in the chapter on the Relation of Master and Servant (*a*).

Injuries affecting a man's *limbs* or *body* may be committed, either (1) by an *assault*, as where one who is in a position to do harm to another lifts up his cane or his fist in a threatening manner, or strikes at him, but misses him (*b*); or (2) by a *battery*, which is the beating of

(*a*) Bk. III., ch. I.

(*b*) Finch, L. 202; *Read* v. *Coker* (1853), 13 C. B. 850.

another against his will, the least touching of another's person, wilfully or in anger, amounting to a battery (*c*); or (3) by *wounding*, which consists in giving another some dangerous hurt, and is only an aggravated species of battery: or (4) by *mayhem*, which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. Among defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth (*d*); but, it is said, that the loss of the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting. For each of these injuries,—assault, battery, wounding, and mayhem,—an action will lie, whereby adequate damages may be recovered; or criminal proceedings may be taken by way of indictment (*e*). It is to be observed, however, as to all these acts, that to render them either actionable or indictable, they must be committed on an unlawful occasion; for under certain circumstances they may be justifiable, and then they form no just ground of complaint either civil or criminal. Thus, assault and battery are justifiable, where one who has authority, as a parent or master, gives moderate correction to his child, his scholar, or his apprentice (*f*). Also, if one strikes me first, I may strike in my own defence, and, if sued for it, may raise the defence of *son assault demesne* (*g*). Again, if a man endeavours to deprive me of my goods and chattels, I may justify laying hands upon him to prevent him, and in case he persists

(*c*) *Coward* v. *Baddeley* (1859), 4 H. & N. 478.

(*d*) Finch, L. 204; Hawk. P. C. bk. i. ch. 44, s. 2.

(*e*) *R.* v. *Mahon* (1836), 4 A. & E. 575. As to the punishment for an *assault* (which is implied in every case of battery, wounding, or mayhem) either by indictment or by way of summary conviction, *ride post*, vol. IV. (BK. VI. ch. IV. and ch. XI.)

(*f*) Hawk. P. C. bk. i. ch. 60, s. 23; *Cleary* v. *Booth*, [1893] 1 Q. B. 465.

(*g*) *Oakes* v. *Wood* (1837), 3 M. & W. 150; *Cockcroft* v. *Smith* (1704), 2 Salk. 642.

with violence, I may proceed to beat him away (*h*). Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another, to turn him out of the church and prevent his disturbing the congregation ; and if sued for this or the like battery, he may set forth the whole case, and state that he laid hands upon him gently (*molliter manus imposuit*) for this purpose.

And besides the more direct injuries to a man's limbs or body which have been enumerated, there is a fifth species of injury thereto, which is indirect or consequential, resulting more particularly from *negligence* in the performance of some duty ; for example, in the case where a passenger in a coach is overturned by the carelessness of the driver (*i*). In such a case, an action for damages will lie against the coach proprietor, not only where he is guilty of the negligence in his own person, but also where the fault was that of his servant acting in the course of his employment (*k*). And for maintaining unprotected, adjoining a highway, a wall covered with spikes which amount to a nuisance, whereby a child is injured, the owner of the wall will be liable (*l*). So, too, an action will lie for injuries caused by allowing dangerous machinery to remain unfenced, in breach of a statutory duty (*m*). Also, for injuries done by an animal naturally ferocious, *i.e.*, an animal by its nature likely to do injury, the owner of the animal is liable (*n*). But the owner of an animal

(*h*) Finch, L. 203.

(*i*) *Clark* v. *Chambers* (1878), 3 Q. B. D. 327 ; *Radley* v. *London and North Western Rail. Co.* (1876), 1 App. Ca. 754 ; *The Bernina, Mills* v. *Armstrong* (1888), 13 App. Ca. 1.

(*k*) *Sharrod* v. *London and North Western Rail. Co.* (1849), 4 Exch. 580 ; *Elliott* v. *Hall* (1885), 15 Q. B. D. 315.

(*l*) *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199.

(*m*) *Grores* v. *Wimborne*, [1898] 2 Q. B. 402.

(*n*) *May* v. *Burdett* (1846), 9 Q. B. 101 ; *Filburn* v. *People's Palace and Aquarium Co., Limited* (1890), 25 Q. B. D. 258.

not naturally ferocious is only liable, if the party injured can show that the owner knew of its dangerous character (*o*).

There may, however, be circumstances in which mischief caused by an animal, though known to be dangerous, will not support an action; for example, in the case of a dog, kept for the protection of its owner's house and yard, if the dog be carefully confined within the premises, and the injury is caused by the plaintiff's having entered the premises improperly, or without sufficient caution, there will be no remedy to the party bitten for the bite (*p*). And, in order to support an action for damages for the bite of a dog, it is necessary to show that the dog had, to the defendant's knowledge, bitten or attempted to bite some person before it bit the plaintiff; it is not sufficient to show that it had to the defendant's knowledge attacked and bitten a goat (*q*). But the liability of owners of dogs has been rendered more onerous by the Dogs Act, 1865, which provides, that if an action be brought for any injury by a dog to *cattle or sheep*, it shall not be necessary for the plaintiff to show either a previous mischievous propensity in the dog, or any knowledge by the owner of such propensity, or even that the injury complained of was attributable to neglect on the part of such owner. The word *cattle* in the Act has been interpreted to include horses (*r*).

[Injuries affecting a man's *health* are, where, by any unwholesome practices of another, a man sustains any damage in his vigour or constitution, as by selling him bad provisions or bad wine (*s*), or by exercising a noisome trade in his neighbourhood (*t*),] or by playing upon him a

(*o*) *Worth* v. *Gilling* (1866), L. R. 2 C. P. 1; *Baldwin* v. *Casella* (1872), L. R. 7 Exch. 325.

(*p*) *Bates* v. *Crosbie*, M. T. 1798, in the King's Bench, cited in Christian's *Black.* vol. iii. p. 154.

(*q*) *Osborne* v. *Chocqueel*, [1896] 2 Q. B. 109.

(*r*) *Wright* v. *Pearson* (1869), L. R. 4 Q. B. 582.

(*s*) 1 Roll. Abr. 90; 6 East, 133; *George* v. *Skivington* (1869), L. R. 5 Exch. 1.

(*t*) 9 Rep. 58.

serious practical joke (*u*). [So, too, an injury to a man's health may be caused by neglect or unskilful management of the surgeon, or physician, who attends him (*x*); and *mala praxis*, whether it be for experiment or by neglect, is a grave offence at common law (*y*). For all these wrongs or injuries, there is a remedy by action to recover damages (*z*).

Injuries affecting a man's *reputation* or good name are, first, by the publication of a slander upon him, *i.e.*, by speaking to a third person defamatory words respecting him. As if a man utters anything of another which accuses him of having committed a criminal offence (*a*), as to say that he has poisoned another or is perjured (*b*); or which charges him with having an infectious disorder, tending to exclude him from society, *e.g.*, leprosy (*c*); or which tends to prejudice him in the way of his office, profession, or trade (*d*), as to say of a magistrate that he is partial or corrupt (*e*), or of a physician that he is a quack (*f*), or of a lawyer that he knows no law (*g*), or of a tradesman that he is a bankrupt (*h*). For words of the several species above mentioned, an action may be had, without proving what is technically called "special

(*u*) *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57.

(*x*) *Dr. Groenvelt's Case* (1697), 1 Ld. Raym. 214; *Huncke* v. *Hooper* (1835), 7 Car. & P. 81; *Lanphier* v. *Phipos* (1838), 8 Car. & P. 475.

(*y*) 1 Ld. Raym. 214.

(*z*) *R.* v. *Long* (1830), 4 Car. & P. 398; *ib.* 407, n. (*a*).

(*a*) *Webb* v. *Bearan* (1883), 11 Q. B. D. 609.

(*b*) *Roberts* v. *Camden* (1807), 9 East, 93.

(*c*) Com. Dig. *Act. Def.* (D. 28); *Bloodworth* v. *Gray* (1844), 7 Man. & G. 334.

(*d*) *Bellamy* v. *Burch* (1847), 16 M. & W. 590; *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797; *Booth* v. *Arnold*, [1895] 1 Q. B. 571.

(*e*) Com. Dig. *Act. Def.* (D. 15); 2 Cro. 90; *How* v. *Prinn* (1702), 2 Salk. 694.

(*f*) *Allen* v. *Eaton* (1630), 1 Roll. Abr. 54; *Goddart* v. *Haselfoot* (1637), 1 Roll. Abr. 54.

(*g*) *Peard* v. *Jones* (1635), Cro. Car. 382.

(*h*) *Robinson* v. *Marchant* (1845), 15 L. J. Q. B., at p. 136; *Brown* v. *Smith* (1853), 13 C. B. 596.

[damage," *i.e.*, the loss of some definite temporal advantage (*i*). Further, by the Slander of Women Act, 1891, making general what was formerly the law in particular places only, such as London and Bristol (*k*), words which impute unchastity or adultery to any woman or girl are now also actionable without proof of special damage. But with regard to disparaging words other than those mentioned above, the plaintiff, in order that he may succeed, must aver and prove that the words have caused him special damage, which used to be called laying the action with a *per quod* (*l*).] As if I say of a commission agent, that he is an unprincipled man, and borrows money without repaying it, this is not in itself actionable ; but if I say this to a person who was going to deal with him, and he forbears to do so in consequence of its being said, here, there being special damage, an action will lie against me (*m*).

It is, however, to be understood, that even where special damage has been sustained in consequence of words spoken with respect to any person, yet if the words are not in themselves disparaging, it is *damnum absque injuriâ*, and no action can be maintained upon them (*n*).

[Secondly, a man's reputation may be injuriously affected by the publication of a *libel* upon him, which may be by writing, printing, picture, or the like, of a defamatory character.] The nature of this injury is in general similar to that of slander, but there are some material differences between the two. For, first, in the

(*i*) *Foulger* v. *Newcomb* (1867), L. R. 2 Ex. 327 ; *Miller* v. *David* (1874), L. R. 9 C. P. 118.

(*k*) *Power* v. *Shaw* (1744), 1 Wils. 62.

(*l*) *Hopwood* v. *Thorn* (1849), 8 C. B. 293 ; *Barnett* v. *Allen* (1858), 3 H. & N. 376 ; *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407.

(*m*) *Storey* v. *Challands* (1837), 8 Car. & P. 234 ; *The Western Counties Manure Co.* v. *The Lawes Chemical Manure Co.* (1874), L. R. 9 Exch. 218.

(*n*) *Kelly* v. *Partington* (1833), 5 B. & Ad. 645.

case of libel, the law assumes, that, of necessity, the person defamed has suffered damage, and, in the absence of legal justification or excuse, the publication of such a statement is wrongful (*o*) ; while, on the other hand, as we have seen, in the case of slander, words are not actionable unless either they impute to the defamed person charges of the offensive kind above specified (*p*), or else produce as their natural consequence some special damage. And again, not only such imputations as will support an action for words spoken, but all contumelious matter that tends to degrade a man in the opinion of his neighbours, or to make him ridiculous, will amount, when conveyed in writing, printing, picture, or the like, to libel (*q*). Lastly, while oral defamation is ground for an action only, there are, in the case of a published libel, two remedies, one by indictment, (or sometimes by criminal information,) and the other by action ; the former for the *public* offence, for every libel has a tendency to provoke a breach of the peace, and the latter for the *private* injury to compensate in damages the person who has been libelled.

In order to determine whether a statement is defamatory, it must be construed in its natural and ordinary meaning ; and if not defamatory in such meaning, it must be construed in the special meaning, if any, in which it was understood by the persons by and to whom it was published (*r*). It is for the judge to say, whether, in such a case, the words are reasonably capable of a defamatory meaning ; but it is for the jury to say whether, under the circumstances of the case, the words in fact bear that meaning (*s*).

(*o*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. at p. 529 ; and *South Hetton Coal Co.* v. *N. E. News Association*, [1894] 1 Q. B. at p. 144.

(*p*) *Supra*, pp. 397, 398.

(*q*) *Monson* v. *Tussauds, Ltd.*, [1894] 1 Q. B. 671.

(*r*) *Capital and Counties Bank* v. *Henty* (1882), L. R. 7 App. Ca. 741 ; Fraser, *Libel and Slander* (3rd ed.), p. 9.

(*s*) *Henty's Case*, *supra* ; *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, at pp. 73, 76, 77.

When the words are not *primâ facie* defamatory, and when the plaintiff therefore intends to maintain that the words were defamatory by reason of their being understood in a special sense, he must be careful to insert in his Statement of Claim an averment specifying the defamatory meaning of the words complained of, and showing how they come to have that meaning, and how they relate to the plaintiff (*t*). Such averment is called an *innuendo;* but no innuendo is necessary when the words complained of are defamatory in their ordinary meaning (*u*).

No *action* can be maintained for libel or slander unless there be *publication*, that is to say, unless there be a communication by the defendant of the words complained of to some person other than the plaintiff (*x*); but in criminal cases it is not necessary that there should be publication in this sense, it being sufficient if the words complained of be communicated by the defendant to the prosecutor himself, and that their natural tendency is to provoke the prosecutor to commit a breach of the peace (*y*).

The defences peculiar to an action of libel are four in number, viz. :—1. Justification ; 2. Fair comment ; 3. Privilege ; and 4. Apology. The last-named defence is, however, only available when the libel is "contained " in a public newspaper or other periodical publication." Similar defences, with the exception of that of Apology, are open to the defendant in an action of slander.

Of these defences in their order—

1. *Justification.*—In all cases of actions (as opposed to prosecutions) for injury to the reputation, if the

(*t*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Ca. at p. 748.

(*u*) *Ibid.* ; *Russell and another* v. *Webster* (1874), 23 W. R. 59.

(*x*) *Barrow* v. *Lewellin* (1615), Hob. 62 ; *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524.

(*y*) *Rex* v. *Garrett, Hicks' Case* (1618), Hob. 215 ; *Rex* v. *Wegener* (1817), 2 Stark. 245 ; *Reg.* v. *Brooke* (1856), 7 Cox C. C. 251.

defendant can prove the words spoken to be *true*,—*i.e.*, in legal phraseology, if he can *justify* the words complained of, the action will be barred ; and this whether they were or were not in law defamatory, or whether special damage ensued or not. For the action being only for damages, the law esteems the truth a bar to the recovery of damages.

The defendant must prove that the *whole* libel is *substantially* true (*z*) ; and if there be gross exaggeration, the plea of justification will fail (*a*). On the other hand, it is not necessary to justify every detail of the charge or general terms of abuse, provided that the gist of the libel or slander is proved to be substantially correct, and that the details which are not justified produce no different effect on the mind of the reader than the actual truth would do (*b*).

It is not a defence to criminal proceedings to prove that the words complained of are true ; the defendant must then be prepared to go further, and prove, that not only are the words true, but that it is for the public benefit that they should be published (*c*).

2. *Fair Comment.*—No action lies, if the defendant can prove that the words complained of are a fair and *bonâ fide* comment on a matter of public interest. And this distinction is to be remembered, namely, that the Court decides whether the matter commented on is one of public interest ; and if the court is of opinion that there is some evidence that the comment is unfair, then the jury finds whether it is so in fact (*d*).

(*z*) *Bishop* v. *Latimer* (1861), 4 L. T. 775.

(*a*) *Clarkson* v. *Lawson* (1829—30), 6 Bing. 266, 587 ; *Wakley* v. *Cooke and Healey* (1849), 19 L. J. Ex. 91.

(*b*) Fraser, *Libel and Slander* (3rd ed.), p. 86 ; *Willmett* v. *Harmer and Another* (1839), 8 Car. & P. 695.

(*c*) Libel Act, 1843 (Lord Campbell's Act), s. 6.

(*d*) *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, at p. 143 ; *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100.

It is incorrect to say that *bonâ fide* comments on matters of public interest come under qualified privilege (*e*); for, in such a case, the defence really is, that the words are not defamatory, but only fair and proper comment (*f*). All comment must be *bonâ fide;* and criticism must not be made a cloak for malice (*g*). The matter commented on must, moreover, be a matter of public interest; under which description come all State and parliamentary matters (*h*), the public conduct of every one who takes part in public affairs (*i*), but not the private conduct of such persons, save in so far as it affects their public relations (*j*), legal (*k*) and ecclesiastical matters (*l*), the management of the poor and the administration of the poor law (*m*), the conduct or management of places of public amusement or entertainment (*n*), literature (*o*), art (*p*), and, in short, anything which invites public attention or criticism (*q*).

3. *Privilege.*—Where defamatory words are spoken or written in the course of parliamentary, judicial, naval, military, or state proceedings, they will not support an

(*e*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769; *Merivale* v. *Carson* (1887), 20 Q. B. D. 275.

(*f*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769.

(*g*) *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100.

(*h*) *Dunne* v. *Anderson* (1825), 3 Bing. 88; 10 Moore, 407; R. & M. 287; 28 R. R. 591; *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73; 38 L. J. Q. B. 34.

(*i*) *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. at p. 689; 35 L. J. Q. B 209.

(*j*) *Pankhurst* v. *Hamilton* (1887), 3 Times L. R. 500.

(*k*) *Cox* v. *Feeney* (1863), 4 F. & F. 13; *Purcell* v. *Sowler* (1877), 2 C. P. D. 215.

(*l*) *Kelly* v. *Tinling* (1865), L. R. 1 Q. B. 699; 35 L. J. Q. B. 231.

(*m*) *Purcell* v. *Sowler* (1877), 2 C. P. D. 215; 46 L. J. C. P. 308.

(*n*) *Dibdin* v. *Swan and Bostock* (1793), 1 Esp. 28; *Green* v. *Chapman* (1837), 4 Bing. N. C. 92; 5 Scott, 340.

(*o*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769.

(*p*) *Thompson* v. *Shackell* (1828), M. & M. 187; 31 R. R. 728.

(*q*) *Morrison* v. *Belcher* (1863), 3 F. & F. 614; *Duplany* v. *Daris* (1886), 3 Times L. R. 184; *Merivale* v. *Carson* (1887), 20 Q. B. D. 275.

action ; for on such an occasion the words are absolutely privileged in the interests of public policy, and are protected, no matter how untrue or malicious, or what special damage they have caused (*r*).

Upon certain other occasions, the privilege is not absolute, but merely qualified. Upon occasions of qualified privilege, no action lies unless the plaintiff proves that the defendant, in publishing the words complained of, was actuated by express malice, *i.e.*, by any corrupt or wrong motive, or personal spite or ill will (*s*). When the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is one of qualified privilege : so again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it (*t*). Under this head of privilege come communications as to the characters of clerks and servants ; for no one is obliged to give his clerk or servants a character, but if he does so, he must do it honestly, and then, even if it be in fact untrue, the master will be protected (*u*).

Under the head of qualified privilege come also fair and impartial reports of proceedings in parliament, or in any court of justice, or in any public meeting or meeting of certain public bodies and persons specified in section 4 of the Law of Libel Amendment Act, 1888 ; in all which cases, the plaintiff, in order to succeed, must prove that the defendant had been actuated by malice.

4. *Apology.*—The above mentioned defences of justification, privilege, and fair comment, are equally applicable to libel and slander. There is, however, a further defence under section 2 of the Libel Act, 1843 (Lord Campbell's Act). This defence is only available in an action for a libel contained in a public newspaper or other periodical

(*r*) Fraser, *Libel and Slander* (3rd ed.), p. 103.

(*s*) *Ibid.* p. 152.

(*t*) *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, at p. 530.

(*u*) *Murdoch* v. *Funduklian* (1885), 2 Times L. R. 215, 614.

publication ; and to sustain it the defendant must prove —(1) that the libel was published without actual malice and without gross negligence ; and (2) that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or publication a full apology for such libel. Moreover, by the Libel Act, 1845, section 2, there must be payment of money into court by way of amends at the time the plea is filed ; and therefore, having regard to Order XXII., Rule 1, no other defence denying liability can be pleaded together with such plea.

For the sake of convenience, it seems desirable to deal shortly in this place with the subject of slander of title, which consists of a false and malicious statement, in writing, printing or by word of mouth, injurious to any person's title to property, and causing special damage to such person. For the publication of such a statement, an action will lie. And yet in such a case, there is no wrong to the reputation—no defamation—and the action is not for libel or slander, but is an action on the case for special damage, sustained by reason of the speaking or publication of the slander of the plaintiff's title (*x*). In order to succeed, the plaintiff must prove :—

(1.) That the statement is false ;

(2.) That it is malicious in fact ; and

(3.) That it has caused him special damage.

It is also actionable to publish maliciously, or without lawful occasion, a false statement disparaging the goods of any person, and causing such person special damage (*y*).

A third way of destroying or injuring a man's reputation, is by preferring a malicious indictment or prosecution

(*x*) *Smith* v. *Spooner* (1810), 3 Taunt. 246 ; *Malachy* v. *Soper* (1836), 3 Bing. N. C. 371.

(*y*) *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (1874), L. R. 9 Ex. 218, 222 ; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524 ; *White* v. *Mellin*, [1895] A. C. 154 ; *Hubbuck & Sons, Limited* v. *Wilkinson, Heywood and Clark, Limited*, [1899] 1 Q. B. 86.

against him. For, under the mask of justice and public spirit, the process of the law is sometimes made the engine of private spite and enmity (*z*) ; and for this, accordingly, an adequate remedy is afforded, by awarding damages in an action for a false and malicious prosecution. Which action may be brought, either against a single person or against several, with an allegation, in the latter case, that they conspired together for the purpose (*a*). However, any reasonable and probable cause for preferring a prosecution is sufficient to justify the defendant ; and in order to maintain this action, the burthen lies therefore on the plaintiff of showing that no reasonable or probable cause existed (*b*), and he must also prove that the defendant acted maliciously. The malice here spoken of is malice in fact, —*i.e.*, an indirect or improper motive,—being any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice (*c*). The existence of malice is purely a question of fact for the jury, and absence of reasonable and probable cause is not of itself sufficient evidence of malice (*d*). The jury find the facts on which the question of reasonable and probable cause depends ; and the judge then decides whether the facts so found constitute reasonable and probable cause (*e*). The plaintiff must prove, either that he was acquitted upon such prosecution, or that it was in some other manner legally determined in his favour (*f*), *e.g.*, he may show, that the indictment was either thrown out by the grand jury, or quashed by the court ; for it is not the danger of the

(*z*) *Turner* v. *Ambler* (1847), 10 Q. B. 252.

(*a*) 1 Saund. by Williams, 229 a.

(*b*) *Abrath* v. *North East. Rail. Co.* (1886), 11 App. Ca. 247.

(*c*) *Stevens* v. *Midland Counties Rail. Co.* (1854), 10 Ex. at p. 356.

(*d*) *Brown* v. *Hawkes*, [1891] 2 Q. B. 718. See particularly the observations of Bowen, L.J., at pp. 727—728.

(*e*) *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521.

(*f*) *Morgan* v. *Hughes* (1788), 2 T. R. 225 ; Willes, 520 n. ; *Whitworth* v. *Hall* (1831), 2 B. & Ad. 695.

plaintiff, but the scandal, vexation, and expense to which he is put, upon which this action is founded (*g*).

Fourthly, right of personal *liberty* may be invaded by the injury of false imprisonment (*h*); and to constitute this injury, there are two points requisite:—1. The detention of the person; and 2. The unlawfulness of such detention. Every detention of the person is an imprisonment, whether it be in a common prison, or in a private house; or even by forcibly detaining one in the street (*i*). The detention may be actual,—*e.g.*, laying hands upon a person, or constructive,—*e.g.*, by an officer telling any one he is wanted, and making him accompany him (*k*). There must be some restraint, although not necessarily incarceration; but the restraint must be total, a mere partial restraint not being sufficient (*l*). The plaintiff need only prove the detention or imprisonment. The defendant must then justify what he did, which he can do by showing that he acted by authority, derived, either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment, or from some other special cause warranting an arrest for the necessity of the thing, as where a felon is arrested in the act by a private person without warrant. False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the Sunday Observance Act, 1677, section 6, hath declared, that such service, except in cases of treason, felony, breach of the peace, or other indictable offence (*m*), shall be void.

(*g*) *Jones* v. *Gwynn* (1712), 10 Mod. 149, 220; *Chambers* v. *Robinson* (1747), 1 Str. 691.

(*h*) *Bird* v. *Jones* (1845), 7 Q. B. 742; *Turner* v. *Ambler* (1847), 10 Q. B. 252.

(*i*) 2 Inst. 589.

(*k*) *Grainger* v. *Hill* (1838), 4 Bing. N. C. 212.

(*l*) *Bird* v. *Jones* (1845), 7 Q. B. 742.

(*m*) *Rawlins* v. *Ellis* (1846), 16 M. & W. 172.

Secondly, Injuries affecting Rights of Property.

We arrive next at the consideration of such injuries as affect the right of *property*. And we will consider, in the first place, injuries to real property; and, secondly, injuries to personal property.

(I.) And, first, Injuries to real property, being the six following, namely:—1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; and 6. Disturbance. And we shall explain each of these six injuries in the order we have enumerated them (*n*).

[1. *Ouster* is an injury sustained in respect of hereditaments either corporeal or incorporeal; but with regard to incorporeal hereditaments, ouster is nothing more than a disturbance of the enjoyment, and it amounts to an ouster, only if the owner elected so to treat it (*o*). Formerly damages were, in general, the only relief available for an incorporeal ouster (*p*); but for an advowson, a real action, that of *quare impedit*, would lie (*q*).

Ouster (meaning ouster from *corporeal* hereditaments) may be either of the *freehold*, or of *chattels real*; and—

First, *Ouster of the Freehold*.—This may be effected in four several ways:—1. By *abatement*,—which is where a person dies seised of an inheritance, and, *before the heir or devisee enters*, a stranger who has no right makes entry; this his entry being called an abatement, and he himself being called an abator (*r*). 2. By *intrusion*,—which is the entry of a stranger, *after a particular estate of freehold*

(*n*) Some of the terms used and explained in the following pages of this chapter are seldom used at the present time, and some are practically obsolete; but a knowledge of them and their meanings is still very useful to the student and practitioner.

(*o*) Co. Litt. 199 b, 373 b; *Steadman* v. *Smith* (1857), 8 El. & Bl. 1.

(*p*) *Challenor* v. *Thomas* (1607), Yelv. 143.

(*q*) See "*Disturbance*," *infra*.

(*r*) Finch, L. 195.

[*is determined, before him in remainder or reversion;* such stranger being termed an intruder (*s*). 3. By *disseisin*,—which is a wrongful putting out of him that is seised of the freehold: not, as in the other cases, a wrongful entry where the possession was vacant, but an attack upon him who is in actual possession, and turning him out of it. And as the two former kinds were an ouster from a freehold in law, so this is an ouster from a freehold in deed (*t*). 4. By *deforcement*,—which (in its most extensive sense) signifies the holding of any lands or tenements to which another person hath the right (*u*); so that deforcement includes as well an abatement, an intrusion, or a disseisin, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the particular ousters previously described, it imports such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. Thus, where lands escheat, *propter defectum sanguinis*, to the lord of a seigniory, but the seisin of the lands is withheld from him, here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never actually possessed; and, being none of these three, it is therefore a *deforcement* (*x*). Again, if a man lease lands to another, for a term of years or for the life of a third person, and the term expires by surrender, or by efflux of time, or by the death of the *cestui qui vie;* and the lessee or any stranger who was, at the expiration of the term, in

(*s*) Co. Litt. 277; F. N. B. 203, 204.

(*t*) *Taylor* v. *Horde* (1755), 1 Ld. Ken. 143; *Doe* d. *Maddock* v. *Lynes* (1824), 3 B. & C. 388; *Doe* v. *Hull* (1822), 2 Dow. & Ry. 38; *Williams* v. *Thomas* (1810), 12 East, 141.

(*u*) Co. Litt. 277; Co. Litt. by Butl. 331 b, n. (1).

(*x*) F. N. B. 143.

[possession, holds over, and refuses to deliver the possession to him in remainder or reversion, this is likewise a deforcement (*y*). Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other: as where the ancestor dies seised of an estate in fee simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety,—this is also a deforcement (*z*). And, in addition to all the above modes of ouster, there was formerly another, viz., 5. *Discontinuance* (*a*),—which was where a tenant in tail in possession made a feoffment in fee simple, and created thereby, in fact, a fee simple, but a *tortious* one. By so doing, he injured the heir-in-tail or (as the case might be) the remainderman, by taking away, or *tolling*, his right of entry;] but by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), this doctrine of tolling the right of entry has been abolished, and by the Real Property Act, 1845 (8 & 9 Vict. c. 106), section 4, a feoffment made after the 1st October, 1845, has now no tortious operation. So that discontinuance, as a species of ouster, has ceased to exist.

Secondly, [*Ouster of Chattels Real.*—This is of two species, being either (1) Amotion from the possession of estates held by statute, recognizance, or elegit, before the estate of the tenant has been determined, that is to say, before the sum has been raised for which the estate was given as a security; or (2) Amotion from the possession of an estate for years, which also takes place by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land, before his term has determined.

In the case of abatement, intrusion, and disseisin, the party ousted might have recovered the possession either

(*y*) Finch, L. 263; F. N. B. 201, 205—7.

(*z*) Finch, L. 293, 294; F. N. B. 197; Co. Litt. 199 b.

(*a*) Co. Litt. 327 b.

[(1) by an action *possessory*, brought to determine the right of possession; or (2) by an action *droitural*, brought to determine the right of property (*b*). But as the abator, intruder, or disseisor, had a mere naked possession without right, the law also gave the injured party (*while the adverse possession was recent*) the extra-judicial remedy by *entry*. But if the abator, intruder, or disseisor, died seised, and the land descended to his heir, or if the ouster was by deforcement, the heir, or (as the case might be) the deforciant, was considered to have acquired the *apparent right of possession* (*c*), because the heir, in respect of the descent, and the deforciant, in respect of the lawful inception of his title, had evidently a better or more colourable right than that gained by mere abatement, intrusion, or disseisin. He was not, therefore, liable to expulsion by mere entry, but the estate or interest of the person ousted was said to be *turned to a right* (*d*); and this obliged the latter to resort to his real action (possessory or droitural). And even as against the abator, intruder, or disseisor himself, he would have lost his entry and been driven to his real action, if he had permitted the twenty years to run by, which were prescribed by the Limitation Act, 1623 (21 Jac. I. c. 16), for his remedy by *entry*.

The claimant, if, in the days when such actions existed, he commenced his real action *possessory*, might have sued out either a writ of *entry* or a writ of *assize*; in the former showing merely the unlawful commencement of the adverse title, and in the latter proving also his own title. But if he neglected to sue out either of those two writs, within the period of time allowed in that behalf, or if judgment (although by default) was given against him in his possessory action, or if the ouster had taken place

(*b*) 2 Bl. Com. 197; 3 Bl. Com. 179, 185.

(*c*) 2 Bl. Com. 196; 3 Bl. Com. 179.

(*d*) Co. Litt. by Butl. 332 b, n. (1).

[upon a discontinuance,—the adverse party was considered as having acquired *an actual right of possession* (*e*), and the claimant was thereafter driven to his real action *droitural* (*f*). And of such droitural actions, the principal one was the *writ of right* (*g*), sometimes called the *writ of right proper*, which writ was esteemed "the highest writ "of the law" (*h*); but there were other writs *in the nature* of writs of right, such as the writ of *formedon*, which was the remedy for tenant in tail on a discontinuance (*i*), and the writ of dower *unde nihil habet*, which was the remedy of a dowress to whom dower had not been assigned (*k*). These real actions droitural were all subject (like real actions possessory) to a certain period of limitation, that for the writ of right being sixty years; and it was competent to the defendant in a writ of right, to plead that he had more right to hold than the plaintiff had to claim, which was called the *mise* upon the mere right. And this issue he might have referred, either to the *grand assize*, or to *trial by battle* (*l*).

In course of time *real actions* (whether possessory or droitural) were deemed unacceptable remedies, the course of proceedings in them being dilatory and intricate (*m*), and the judgment conclusive; so that the plaintiff, failing by any accident in one, was not at liberty to bring another (*n*). And so the *personal* action of trespass *de ejectione firmæ*, afterwards compendiously called *an ejectment*, came to be resorted to in lieu of the real action.] But if the claimant had lost his right of *entry*, he could not have resorted to an ejectment, for the right to eject

(*e*) 3 Bl. Com. 179, 191.

(*f*) 2 Bl. Com. 197.

(*g*) *Davies* v. *Lowndes* (1845), 1 C. B. 435; 3 C. B. 808.

(*h*) 3 Bl. Com. 193.

(*i*) *Ibid.* 191; *Tolson* v. *Kaye* (1843), 6 Man. & G. 536; *Cannon* v. *Rimington* (1852), 12 C. B. 1, 514.

(*k*) 2 Wms. by Saund. 44 *e*; *Hethrington* v. *Graham* (1829), 6 Bing. 135; *Watson* v. *Watson* (1850), 10 C. B. 3.

(*l*) *Vide post*, bk. VI. ch. XVIII.

(*m*) 3 Bl. Com. 197; Reeves, *Hist. Eng. Law*, vol. iv. p. 166.

(*n*) Reeves, vol. iv. p. 166.

implied the right to recover the possession which had been recently disturbed (*o*), as well as damages for the disturbance; and the remedy by *real* action (possessory or droitural) continued to be the proper remedy in such a case, until, by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), real and mixed actions as a class (with the one or two exceptions already specified) were swept away, and it was thereby enacted, that, unless in the cases of disability therein mentioned, *no entry should be made, or action brought*, to recover land, but within twenty years after the right accrued, a period which has since been shortened to that of *twelve* years, by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57).

The *present* mode of proceeding for the recovery of the possession of land, whether by a landlord against his own tenant, or by a stranger, is either by entry, or by an action for the recovery of the possession of land, which is still often called an "action of ejectment" or simply "ejectment"; although, by the effect of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and of the Judicature Acts, this action is commenced and prosecuted and concluded in most respects like any other ordinary action in the High Court of Justice.

And here we must take notice of certain legislative provisions in favour of *landlords*, bringing actions of ejectment against their tenants, or defending such actions when brought against their tenants by strangers.

And, first, by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), section 209 (re-enacting a similar provision contained in the Distress for Rent Act, 1737, section 12), all tenants must, on pain of forfeiting three years' rent, give notice to their landlords of any writ in ejectment delivered to them, or coming to their knowledge.

Secondly, by the Common Law Procedure Act, 1852, section 210, (re-enacting in substance the Landlord and

(*o*) 3 Bl. Com. 205; Reeves, *Hist. Eng. Law*, vol. iii. p. 390; vol. iv. p. 165.

Tenant Act, 1730, section 2,) in all cases of ejectment between landlord and tenant, if half a year's rent be in arrear (*p*), and there be a right to re-enter for the non-payment (*q*), and no sufficient distress be found (*r*), the landlord may, without any formal demand of the rent, or re-entry (*s*), serve a writ in ejectment for the recovery of the demised premises; and the judgment (with the execution thereon) in such an ejectment is final and conclusive, unless the rent, with the full costs, is paid or tendered within six calendar months after the execution.

Thirdly, by the Landlord and Tenant Act, 1730, if any tenant for life or for years, or other person claiming under or by collusion with him, shall wilfully (*t*) hold over after the determination of the term, after demand of possession made, and notice in writing given by him to whom the remainder or reversion of the premises shall belong (*u*), an action for *double* the yearly value, during the time he detains the land, will lie against him; and by the Distress for Rent Act, 1737 (11 Geo. II. c. 19), section 18, any tenant, with power to determine his lease, who shall give notice of his intention to quit, and shall not deliver up possession at the time he mentions, shall pay in like manner *double* his former rent for such time as he continues thenceforth in possession (*x*). And in order to give landlords, as against their tenants holding over, where the property is of small value, the option of a cheaper and more speedy remedy than that by action, it has been

(*p*) *Gretton* v. *Roe* (1847), 4 C. B. 576.

(*q*) *Doe* v. *Bowditch* (1846), 8 Q. B. 973.

(*r*) *Doe* v. *Wandlass* (1797), 7 T. R. 117.

(*s*) *Duppa* v. *Mayo* (1670), 1 Saund. Wms. 281. At law a formal demand of the rent on the day it became due was, and, except in the cases provided for by this section, still is, essential; unless dispensed with by the lease.

(*t*) *Swinfen* v. *Bacon* (1860), 6 H. & N. 184, 846.

(*u*) *Blatchford* v. *Cole* (1858), 5 C. B. (N.S.) 514; *Southport Tramways* v. *Gandy*, [1897] 2 Q. B. 66.

(*x*) *Wilkinson* v. *Colley* (1771), 5 Burr. 2694; *Soulsby* v. *Neving* (1808), 9 East, 310; *Page* v. *More* (1850), 15 Q. B. 684.

provided, by the Small Tenants Recovery Act, 1838 (1 & 2 Viet. c. 74) (*y*), that a tenant at will, or for a term not exceeding seven years, without rent, or at a rent not exceeding 20*l*. a year, who, or the person occupying under him, shall fail to deliver up possession after his interest has ended or been duly determined, may be ejected, after being served with written notice, by a summary proceeding before *any two justices* of the district; but the warrant for possession will be stayed, if the tenant shall give security to bring an action to try the right, and to pay the costs in the event of judgment being given against him. Relief of the same kind, to a landlord against his tenant holding over, is also now afforded through the medium of the *county courts*, not only in cases where the yearly value of the tenement is below 20*l*., but also where such value does not exceed 50*l*. and where no fine or premium has been paid for the lease,—it being enacted, by the County Courts Act, 1888 (51 & 52 Viet. c. 43), section 59, that if the term and interest of the tenant shall have expired or determined by a legal notice to quit, and the tenant, or any person holding or claiming through him, shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint in the county court of the district; and after judgment given in his favour, may obtain possession, through the high bailiff of the court (*z*), to whom a warrant may be issued for that purpose to the registrar (*a*). But the defendant may have the action removed into the High Court, upon the ground that the title to lands of greater value will be affected by the decision (*b*).

(*y*) *Jones* v. *Chapman* (1845), 14 M. & W. 124; *Delaney* v. *Fox* (1856), 1 C. B. (N.S.) 166; *Rees* v. *Davies* (1858), 4 C. B. (N.S.) 56; *Edwards* v. *Hodges* (1855), 15 C. B. 477.

(*z*) *Hodson* v. *Walker* (1872), L. R. 7 Exch. 55.

(*a*) *Jones* v. *Owen* (1848), 5 D. & L. 669; 18 L. J. Q. B. 8; *Harrington* v. *Ramsay* (1853), 8 Exch. 879; 2 El. & Bl. 669.

(*b*) Sects. 59—61.

Where a landlord is proceeding by action against his tenant for recovery of possession of the demised premises under a proviso for re-entry for non-payment of rent, the Common Law Procedure Act, 1860, section 1, gives the court power to grant the tenant relief from the forfeiture, on such terms as to payment of the rent in arrear and costs and otherwise as may be just. In the case of most covenants other than that for payment of rent, the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), section 14, provides that the landlord cannot enforce his right of re-entry by action or otherwise, unless he first gives to the lessee a notice specifying the particular breach complained of, and requiring the lessee to remedy the breach and to make compensation in money for it, and then only if the lessee fails to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money for it. Covenants against assigning, underletting, or parting with possession, and conditions for forfeiture on bankruptcy, and on taking in execution of the lessee's interest, and certain covenants in mining leases, are excepted from the section. The same section provides that the court may in any case within it grant to the lessee relief from the forfeiture on proper terms. This section did not apply to under-lessees; but the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), section 4, enables the court to protect under-lessees against forfeiture of the superior leases, by making an order vesting the superior term in the under-lessee on proper terms.

[2. *Trespass*,—otherwise called trespass *quare clausum fregit*. The injury of trespass *quare clausum fregit*, was so called from the language of the writ of trespass (now disused), which commanded the defendant to show *quare clausum querentis fregit*, *i.e.*, why he *broke the plaintiff's close;* and this breaking was an injury to the plaintiff, because every man's land is, in the eye of the law, inclosed and set apart from his neighbour's, for the *exclusive* use of himself. In order to maintain this action, the plaintiff

[must have an actual possession by entry (*c*) ; and before entry and possession, he cannot maintain this action, though he may have the freehold in law (*d*). And therefore an heir, before entry, cannot have this action against an abator (*e*) ; and though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land, yet he cannot have it for any act done after the disseisin, until he hath regained the possession by re-entry, although he may then maintain it for the intermediate damage done, the possession so regained being, by a kind of *jus postliminii*, supposed to have all along continued in him (*f*). Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrongdoer in trespass ; but, by the Cestui que Vie Act, 1707, if a guardian or trustee for any infant, a husband seized *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements without the consent of the person entitled thereto, they are adjudged to be trespassers, and may be sued in trespass accordingly.

A man is answerable not only for his own trespass, but for that of his cattle also ; for if, by his negligent keeping, they stray upon the land of another, and much more if he drives them on, and they tread down his neighbour's herbage, or damage his cattle (*g*), this is a trespass for which the owner of the cattle committing the trespass must answer in damages. And the law gives to the party injured in this case a right also to distrain the cattle *damage feasant* (doing damage), till the owner shall make

(*c*) *Lambert* v. *Strother* (1740), Willes, 218 ; Com. Dig. *Trespass*.

(*d*) 2 Roll. Abr. 553.

(*e*) *Ibid.*

(*f*) 11 Rep. 5 ; *Barnett* v. *Guildford* (1855), 11 Exch. 19.

(*g*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

[him satisfaction ; but if he distrain, he cannot, so long as he holds the distress, maintain also an action for damages (*h*).

In some cases, an entry on another's land is justifiable, as where it is done in the exercise of a right of way, or the like ; or where a man enters to pay money there payable, or to execute, in a legal manner, the process of the law, or to get back his own goods or to distrain for rent (*i*). Also, a man may justify entering into a public inn without the leave of the owner first specially asked ; because when a man professes the keeping of a public inn, he thereby gives a general licence to any person to enter. And it has been said, that the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land, if they cannot be otherwise killed, and if no greater damage be done than is necessary, because the destroying such creatures may be profitable to the public (*k*). But fox-hunting, as a mere *diversion*, would not justify such an entry (*l*).

Where a man makes an ill use of the authority with which the law thus entrusts him, he shall be accounted a trespasser *ab initio* (*m*) ; for if one comes into a tavern, and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner, this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass (*n*). But a bare nonfeasance, as not paying for the wine or beer he calls for, will not make him a trespasser ; for this is only

(*h*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608 ; *Lehain* v. *Philpott* (1875), L. R. 10 Exch. 242.

(*i*) *Patrick* v. *Colerick* (1838), 3 M. & W. 483 ; *Keane* v. *Reynolds* (1853), 2 E. & B. 748.

(*k*) *Gensh* v. *Mynns* (1612), Cro. Jac. 321 ; *Gundry* v. *Feltham* (1786), 1 T. R. 334.

(*l*) *Paul* v. *Summerhayes* (1878), 4 Q. B. D. 9, citing *Essex* v. *Capel*, Chitty, *Game Laws*, p. 31.

(*m*) *The Six Carpenters Case* (1610), 8 Rep. 146 ; 1 Sm. L. C. 11th ed. 132 ; Finch, L. 47 ; *Bagshawe* v. *Goward* (1606), Cro. Jac. 147.

(*n*) 2 Roll. Abr. 561.

[a breach of contract. In like manner, if a landlord distrain cattle for rent and wilfully kill the distress, or commit any other irregularity, this by the common law made him a trespasser *ab initio* (*o*) ;] but the rule is now otherwise (*p*). No officer of any county court executing a warrant of the court, nor any person at whose instance such warrant is executed, is to be deemed a trespasser, by reason of an irregularity or informality in the warrant, or in the mode of executing same, or in any proceeding on the validity of which the warrant depends ; although, for any special damage, the party injured may have his action on the case (*q*).

[3. *Nuisance* (*nocumentum*) signifies any thing that worketh hurt, inconvenience, or damage. A nuisance is of two kinds, *i.e.*, either public or private. A *public* or *common* nuisance is one which affects the public, and is an annoyance to all the lieges, for which reason it belongs to the class of public wrongs or crimes, and will be dealt with in Part VI. of these Commentaries. A *private* nuisance may be defined as anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another, whereby he suffers more than the public at large (*r*) ; but a mere trespass to his field, even a continuing trespass, is not regarded as a nuisance (*s*), because it is something more definite, namely, a trespass.

In discussing private nuisances, we will consider, first, such nuisances as may affect a man's corporeal hereditaments, secondly, those which may damage such as are incorporeal, and, thirdly, we will state briefly the remedies open to a man who has been injured by a private nuisance. First, Nuisances to corporeal hereditaments.—If a man builds his house so close to mine that the roof overhangs my roof, and the water flows off his roof on to mine, he

(*o*) Finch, L. 47.

(*p*) *Vide sup.* pp. 282, 283.

(*q*) County Courts Act, 1888, s. 52.

(*r*) *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400.

(*s*) F. N. B. 188.

[commits a nuisance, for which an action will lie (*t*). He also commits a nuisance if he obstructs the free passage of light coming to my house (*u*); and the case is the same, if the boughs of his tree are allowed to grow so as to overhang my land, which they had not before been accustomed to do (*x*). Also, if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him, and makes the air unwholesome, this is a nuisance; for it tends to deprive his neighbour of the use and benefit of his house (*y*). And the like injury arises, if any offensive trade, as a tanner's, a tallow chandler's, or a brick-maker's, be set up and exercised close to my land; for though these are lawful and necessary trades, yet they should be exercised in remote places (*z*). And if one erects a smelting-house so near the land of another that the vapour and smoke thereof kill the corn and grass, that is a nuisance (*a*). And it may be laid down generally, that if one does an act which is, in itself, lawful, but which, being done where it is done, necessarily tends to damage the land of another, that is a nuisance, for it is incumbent on him to find some other place to do the act where it will be less offensive; the rule being, in this as well as in the other examples above given, *sic utere tuo, ut alienum non lædas* (*b*). And a nuisance may even arise by an omission to perform a legal duty; as if my neighbour is bound to scour a ditch

(*t*) *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80.

(*u*) *Bass* v. *Gregory* (1890), 25 Q. B. D. 481; *Hall* v. *Lichfield Brewery Co.* (1880), 49 L. J. Ch. 655; *Yates* v. *Jack* (1866), L. R. 1 Ch. 295.

(*x*) *Norris* v. *Baker* (1616), 1 Roll. Rep. 393; *Lodie* v. *Arnold* (1697), 2 Salk. 458; *Lemmon* v. *Webb*, [1895] A. C. 1.

(*y*) *Aldred's Case* (1610), 9 Rep. 58; *R.* v. *White* (1757), 1 Burr. 333.

(*z*) *Morley* v. *Pragnel* (1638), Cro. Car. 510; *Bamford* v. *Turnley* (1862), 3 B. & Sm. 62; *Crump* v. *Lambert* (1867), L. R. 3 Eq. 409.

(*a*) 1 Roll. Abr. 89.

(*b*) *Firth* v. *Bowling Iron Co.* (1878), 3 C. P. D. 254; *Broder* v. *Saillard* (1876), 2 Ch. D. 692; *Fletcher* v. *Rylands* (1868), L. R. 3 H. L. 330; 1 Sm. L. C. 11th ed. 810

[and does not, whereby my land is overflowed (*c*)], or if the owner of a fence abutting on a highway neglects his duty to repair the fence, and my child (an infant of four years of age) puts his foot on it, and it falls over upon him (*d*). But depriving one of a mere amenity, as of a fine prospect, by building a wall or the like, or opening a window, is not an actionable nuisance (*e*). Moreover, a nuisance may be legalised by statute,—*e.g.*, the vibration and noise caused by a railway: and in such a case no damages are recoverable (*f*), though compensation may in some cases (*g*) be recoverable.

Secondly, as regards *incorporeal* hereditaments. It is a nuisance to stop or divert natural surface water that ought to run to another's meadow or mill (*h*), and to pollute water flowing beneath another's land (*i*); although it is not actionable to deprive your neighbour of underground water which percolates on to his land, even though you act maliciously (*k*). [If I have a way across another's land, and he obstructs me in the use of it, either by totally stopping it, or by putting logs across it, or by ploughing over it, it is in general a nuisance; for in the first case, I cannot enjoy my right at all, and in the latter, I cannot enjoy it so commodiously as I ought (*l*). And it is an

(*c*) F. N. B. 183 (Hale's note); *Humphries* v. *Cousins* (1877), 2 C. P. D. 239.

(*d*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320; see *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199.

(*e*) 9 Rep. 58; *Tapling* v. *Jones* (1865), 11 H. L. 290; *Butt* v. *Imperial Gas Co.* (1866), L. R. 2 Ch. App. 158.

(*f*) *Hammersmith Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; *London, Brighton, & South Coast Rail. Co.* v. *Truman* (1885), 11 App. Ca. 45; *Sadler* v. *South Staffordshire Tramways* (1889), 23 Q. B. D. 17.

(*g*) *I.e.*, in cases within the Lands Clauses Consolidation Act, 1845, which is usually incorporated in statutes giving to railway companies and other public bodies powers to do acts which would otherwise be a nuisance.

(*h*) F. N. B. 184; *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409.

(*i*) *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115.

(*k*) *Mayor of Bradford* v. *Pickles*, [1895] A. C. 587.

(*l*) F. N. B. 183.

[actionable nuisance, if I am entitled to hold a fair, market, or ferry, and another person, unless under the authority of a special Act of Parliament enabling him so to do (*m*), sets up a fair, market, or ferry so near mine that he does me a prejudice (*n*). But for this purpose it is necessary (1) That my market or fair be the elder, otherwise the nuisance lies at my own door ; and (2) That the market be erected within the third part of twenty miles from mine, for it is reasonable that every one should have a market within that distance (*o*).

Thirdly, the remedies for a private nuisance are threefold. For the party injured may recover damages for the injury sustained ; he may also have the right to *abate* the nuisance ; and in most cases, an injunction may also be obtained from the court, to stay or prevent the nuisance, or to enforce its abatement by the wrong-doer himself,—the injunction in these cases being in the nature of the relief formerly obtainable in the real actions of *assize of nuisance* and *quod permittat prosternere* (*p*). And, as regards certain varieties of nuisance, the sanitary authority may (by order) compel the summary abatement thereof.

4. *Waste* is the spoil and destruction done or permitted by the tenant, to houses, woods, lands, or other corporeal hereditaments, during the continuance of his particular estate therein (*q*).] Whatever does a lasting damage to the freehold or inheritance is waste ; but if a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste, although if it be burned by the carelessness or negligence of the lessee, it is waste. And where the tenant is bound by covenant to keep the house in repair, he is compellable to rebuild, unless the

(*m*) *Aberyarenny Commissioners* v. *Straker* (1889), 42 Ch. D. 83.

(*n*) F. N. B. 184 ; 2 Roll. Abr. 140 ; *Dorchester* v. *Ensor* (1869), L. R. 4 Exch. 335.

(*o*) F. N. B. 184 (Hale's note).

(*p*) These actions were, however, only available for the tenant of the freehold. (F. N. B. 183, 184.)

(*q*) For the liabilities of the different classes of tenants in respect of waste, see *ante*, bk. II. pt. I. chs. IV. and V.

contract was made expressly subject to the exception of damage by fire (*r*). Waste may also be committed in ponds, dove-houses, warrens, and the like, by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance (*s*). Timber also is part of the inheritance (*t*), oak, ash, and elm being timber in all places ; and other trees are, by the custom of particular counties, considered as timber (*u*). To cut down timber trees, therefore, or to top them, or to do any other act whereby they may decay, is waste (*x*) ; but the tenant may cut down underwood at any seasonable time that he pleases (*y*), and he may also, of common right, take sufficient *estovers*, unless restrained by particular covenants or exceptions (*z*). Again, the conversion of land from one species to another, is waste ; *e.g.*, to convert wood, meadow, or pasture, into arable, to turn arable, meadow, or pasture into woodland, or to turn arable or woodland into meadow or pasture, are all of them waste (*a*). For, as Sir Edward Coke observes, when such a close, which is conveyed and described as pasture, is found to be arable, it not only changes the course of husbandry, but affects also the evidence of the title to estates (*b*) ; and the same rule is observed, with regard to converting one species of *edifice* into another, even though it should thereby be improved in its value (*c*), waste of this improving character being known in law as "meliorating waste." Moreover, to open new mines of metal, coal, and the like, is waste, for it is detriment to the inheritance (*d*) ;

(*r*) *Saner* v. *Bilton* (1878), 7 Ch. D. 815.

(*s*) Co. Litt. 53.

(*t*) 4 Rep. 62.

(*u*) *Honywood* v. *Honywood* (1874), L. R. 18 Eq. 306 ; *Phillips* v. *Smith* (1845), 14 M. & W. 589 ; *Mathews* v. *Mathews* (1849), 7 C. B. 1018.

(*x*) Co. Litt. *ubi sup.*

(*y*) 2 Roll. Abr. 817.

(*z*) Co. Litt. 41.

(*a*) *Lord Darcy* v. *Askwith* (1617), Hob. 234.

(*b*) Co. Litt. 53.

(*c*) *Cole* v. *Green* (1671), 1 Lev. 309 ; *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539 ; *Doherty* v. *Allman* (1878), L. R. 3 App. Ca. 709.

(*d*) 5 Rep. 12.

but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use (*e*). And, in general, any acts or neglects hurtful to the inheritance, are wrongful on the part of a tenant who has an estate less than the inheritance. It is also esteemed waste, if there is a wood subject to common of estovers, and the owner of the wood demolishes the whole wood, whereby he destroys the possibility of estovers (*f*). The law, however, does not regard any act, by whomsoever committed, as amounting to waste, unless there be some *substantial* and considerable damage (*g*), assuming always that the waste does not prejudice the evidence of the title.

The remedy for waste is by action for an injunction, to stay impending or continuing waste, and for damages in respect of the waste already committed (*h*) ; and the action lies not only against the tenant, but against any stranger by whom the waste has been or is being committed. It lies at the suit of one joint tenant, or tenant in common, against the other or others (*i*) ; but not, *semble*, by one coparcener against another (*j*). And, as will be remembered, an action for *dilapidations*, or ecclesiastical waste, may be maintained by a rector or vicar against his predecessor, or the executors of his predecessor ; it being held that the incumbent of a living is bound to keep the parsonage house and the chancel of the church in good and substantial repair, restoring and rebuilding where necessary.

(*e*) *Lord Darcy* v. *Askwith* (1617), Hob. 234.

(*f*) 3 Bl. Com. 224 ; *Chilton* v. *Corporation of London* (1878), 7 Ch. Div. 562.

(*g*) *Doe* d. *Grubb* v. *Lord Burlington* (1833), 5 B. & Ad. 507 ; *The Governors, etc. of Harrow School* v. *Alderton* (1800), 2 Bos. & P. 86.

(*h*) Prior to the abolition of real and mixed actions, by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), there was also the mixed action of *waste*, by which both the demised premises and damages for the waste might have been recovered ; and (in aid of that action) there was the writ of *estrepement*, to prevent the commission or continuance of the injury *pendente lite*.

(*i*) 1 Chitty, *Gen. Pr.* 272.

(*j*) 2 Inst. 403.

[5. *Subtraction* is where any person who owes suit, duty, custom, or other service to another, withdraws or neglects to perform it. *Fealty* and *suit of court* were among the conditions upon which the antient lords granted out their lands to their feudatories; and of the same nature also were such *rents* as fell under the legal denomination of rent service, which rents were the stated returns due, either by antient or modern reservation, from the tenant to his lord, whether in provisions, arms, or the like, or in money. The non-observance of any of the conditions of the grant, was an injury to the freehold of the lord, diminishing the value of the seigniory, and was called the injury of *subtraction*. For the withholding of fealty and suit of court, and in general for the withholding of all rents, there is the peculiar remedy by distress, of which we have already treated; and a distress is the only remedy for fealty and suit of court, but to recover rent, there is also the remedy by action (*k*). As regards *customary services*, the one of most frequent occurrence is that of doing suit to the lord's mill. And where, by usage, the persons resident in a particular place have, time out of mind, been accustomed to grind their corn at a certain mill, and any of them go to another mill and withdraw their suit from the antient mill, that is both a damage and an injury to the owner (*l*); because this custom might have a very reasonable foundation, namely, in the erection of such mill by the ancestors of the owner, for the convenience of the inhabitants and on the condition that when

(*k*) *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368; *Searle* v. *Cooke* (1890), 43 Ch. D. 519. The *real* actions (now abolished) which were available for the recovery of rent in arrear, were the assizes of *mort d'ancestor* and of *novel disseisin*, the writ *de consuetudinibus et servitiis*, and the writ of right *sur disclaimer* (Roscoe, *Real Actions*, 31, 32, 63, 75); and the real actions (also now abolished) which were available to redress the oppressions of *the lord*, were the writ *ne injustè vexes* and the writ of *mesne*. (*Ibid.* 37, 38.)

(*l*) *Harbin* v. *Green* (1616), Hob. 189; *Drake* v. *Wiglesworth* (1752-3), Willes, 654.

[erected, they should grind their corn there only. And for this injury, the owner may bring his action and recover damages (*m*).

6. *Disturbance* is the wrongful obstruction of the owner of an incorporeal hereditament in his enjoyment thereof; and there are six principal species of this injury, namely: —disturbance of *franchise*, disturbance of *common*, disturbance of *fishery*, disturbance of *ways*, disturbance of *tenure*, and disturbance of *patronage*.

Disturbance of *franchise* happens when a man who has any species of franchise, as of holding a court leet, of keeping a fair or market or ferry, of free warren, of taking toll, of seizing waifs or estrays, or the like, is disturbed or incommoded in the lawful exercise thereof (*n*). As if another, by menaces or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market (*o*); or sets up a new ferry, or erects a bridge close to my ferry, whereby I lose custom; or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty. In every case of this kind, there is an injury done to the legal owner; for his property is damnified, the profits arising from his franchise being diminished. To remedy which, he is entitled to sue for damages, or, in case of the refusal to pay toll, may take a distress if he pleases (*p*).

(*m*) *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410; *Richardson* v. *Walker* (1824), 2 B. & C. 827. Formerly, the person injured was enabled to compel the specific performance of the service withdrawn, by the writs (all now abolished) *de sectâ ad molendinum*, *ad furnum*, *ad torrale*, and the like. (F. N. B. 123; Roscoe, *Real Actions*, 36.)

(*n*) As to *ferries*, see *Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224; and as to *fairs* and *markets*, see *Newcastle (Duke)* v. *Worksop Urban Council*, [1902] 2 Ch. 145; *Att.-Gen.* v. *Horner* (1884), 14 Q. B. D. 245; *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Ca. 927.

(*o*) *Dorchester* v. *Ensor* (1869), L. R. 4 Ex. 335.

(*p*) *Heddy* v. *Wheelhouse* (1596), Cro. Eliz. 558.

[Disturbance of *common* is, where any act is done by which the right of common of another is incommoded or diminished. And this may happen in these three ways: —(1.) Where one who hath no right of common puts his cattle into the land, and thereby robs the cattle of the commoners of their respective shares of the pasture; or where one, who hath a right of common, puts in cattle which are not commonable, as hogs and goats, which amounts to the same inconvenience. But the lord of the soil may, by custom or prescription, put a stranger's cattle into the common (*q*); and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common (*r*). In general, however, if the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord, or any of the commoners, may either distrain them *damage feasant* (*s*), or bring their respective actions and recover damages. (2.) Another disturbance of common is by *surcharging* it, that is to say, putting more cattle thereon than the pasture and herbage will sustain, or the party hath a right to do; in which case, he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. This injury by surcharging can, properly speaking, only happen where the right of common is appendant or appurtenant, and of course limitable by law; or where, when in gross, it is expressly limited and certain. For where a man hath common in gross *sans nombre*, or *without stint*, as it is more commonly called, he cannot be a surcharger; but even where a man is said to have common without stint, there must be left sufficient for the lord's own beasts, for the law will not suppose that, at the original grant of the right of common, the lord meant to exclude himself (*t*). For surcharging the common, the

(*q*) 1 Roll. Abr. 396.
(*r*) Co. Litt. 122.
(*s*) 9 Rep. 112.
(*t*) 1 Roll. Abr. 399.

[beasts in excess may be distrained, or any of the commoners may bring his action, and that as well against the lord as against another commoner (*u*). (3.) There is also a disturbance of common, when the owner of the land, or other person, so incloses it, that the commoner is precluded from enjoying the benefit to which he is by law entitled. Which may be done either by erecting fences, or by ploughing up the soil of the common (*x*), or by erecting a warren in the common and stocking it with rabbits in such quantities that they devour the whole herbage ;] but the lord may lawfully erect a warren, provided the rabbits do not increase so as to occasion this inconvenience (*y*). For each of these injuries the commoner may have his action (*z*) ; and, in certain instances, he may *abate* the obstruction,—*e.g.*, where it is a house or a fence (*a*). But he may not cut down trees wrongfully planted by the lord, or kill his rabbits destroying the common, or even fill up the coney-burrows ; his remedy in such cases being by action only (*b*).

Disturbance of *fishery* is where a person fishes in another's fishery, or disturbs or drives away or destroys the fish, or diverts the water flowing to the fishery to an unreasonable extent, or prevents the fish from reaching the fishery.

[Disturbance of *ways* is where a person who hath a right of way over another's grounds is obstructed by

(*u*) Freem. 273 ; 1 Saund. by Wms. 346, n. (2). Until the general abolition of real actions, there was also the *writ of admeasurement of pasture ;* as to which, see F. N. B. 126.

(*x*) *Leverett* v. *Townshend* (1590), Cro. Eliz. 198.

(*y*) *Bellew* v. *Langdon* (1601), Cro. Eliz. 876 ; *Hadesden* v. *Gryssel* (1607), Cro. Jac. 195 ; *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258.

(*z*) Before the abolition of real actions, he was also entitled to the writ of *novel disseisin* or *quod permittat ;* as to which, see 3 Bl. Com. p. 184 ; Roscoe, *Real Actions*, p. 40.

(*a*) *Davies* v. *Williams* (1851), 16 Q. B. 546 ; *Lane* v. *Capsey*, [1891] 3 Ch. 411 ; *Mason* v. *Cæsar* (1676), 2 Mod. 66.

(*b*) 1 Saund. by Wms. 353 a.

[enclosures or other obstacles; by which means, he cannot enjoy his right of way, or, at least, not in so commodious a manner as he might have done. And the remedy is either by abating the obstruction, where abatement is possible, or else by action for an injunction and damages.

Disturbance of *tenure* is where the relation which subsists between the lord and his tenant is dissolved by the wrongful act of a third person, the driving away of a tenant from off his estate being an injury of no small consequence. And therefore, if there be a tenant at will of any lands or tenements, and a stranger, by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigles him into leaving his tenancy, this the law construes to be a wrong to the lord, and gives him an action whereby he may obtain damages against the offender (*c*).

Disturbance of *patronage* is hindering or obstructing the patron in the presentation of his clerk to a benefice; and this injury was distinguished, at the common law, from *usurpation*, the latter being where a stranger that hath no right presenteth a clerk who is admitted and instituted (*d*). The injury of usurpation was antiently very serious, seeing that the patron was, by the common law, absolutely ousted and dispossessed thereby, losing not only his turn of presenting *pro hâc vice*, but losing also the absolute and perpetual inheritance of the advowson, for the recovery of which he was, therefore, obliged to resort to his remedy by *writ of right of advowson*; for, until he had so recovered his right of advowson, he could not, upon the next avoidance, present to the living (*e*). However, by the statute of Westminster the Second

(*c*) Hal. *Anal.* ch. 40; 1 Roll. Abr. 108.

(*d*) Co. Litt. 277; *Keen* v. *Denny*, [1894] 3 Ch. 169.

(*e*) 6 Rep. 49; F. N. B. 30.

[(13 Edw. I.), c. 5, section 2, if either the possessory action of *quare impedit*, which was the general action, or the assize of *darrein presentment*, which was available only for a patron entitled by *descent*, was brought within six months after the avoidance, the patron was entitled, notwithstanding the usurpation, to recover the then presentation, and he thereby recovered his seisin also of the advowson. But if the true patron omitted to bring his action within the six months, the seisin remained with the usurper ; and the patron, to recover it, was still driven to his writ of right. To remedy which, it was enacted, by the Advowsons Act, 1708, that no usurpation should displace the estate or interest of the patron, or turn it to a mere right ; but that the true patron might present, upon the next avoidance, as if no such usurpation had happened (*f*).

Upon the vacancy of a living, if the presentation to it be made within the six calendar months which are allowed to the patron in that behalf, the bishop is bound to admit and institute the clerk, being otherwise sufficient (*g*), but if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious*. And although the bishop may suspend the admission of either candidate, and so suffer a lapse to occur, yet if either patron or either clerk request him to award a *jus patronatûs*, he is bound to do it, a *jus patronatûs* being a commission from the bishop, directed to his chancellor, and to others of competent learning, requiring them to summon a jury of six clergymen and six laymen, for the purpose of enquiring who is the rightful patron. And if, upon the result of such inquiry, the bishop admits and institutes the clerk of that patron whom they return as the rightful patron, he secures himself from being a disturber, whatever proceedings may be had afterwards

(*f*) *Robinson* v. *Marquis of Bristol* (1851), 20 L. J. C. P. 208.

(*g*) The grounds on which the bishop can refuse are defined by the Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 2.

[in the temporal courts (*h*)]. Formerly, if the bishop refused to institute the person presented, the patron had his remedy in the temporal court by *quare impedit*, and the clerk who was refused had his remedy in the spiritual court, by *duplex querela;* this latter remedy being a complaint in the nature of an appeal from the ordinary to his next immediate superior, *e.g.*, from the bishop to the archbishop (*i*), with an ultimate right of appeal to the Privy Council (*k*). And if the court of appeal adjudged the cause of refusal to be insufficient, it would grant institution to the appellant.

But now by the Benefices Act, 1898 (61 & 62 Vict. c. 48), section 3, where a bishop on certain specified grounds, which include unfitness or disqualification of the presentee, other than the ground of doctrine or ritual, refuses to admit the presentee, he must signify his refusal in writing to the patron and the presentee; and within one month after such signification either the patron or the presentee may require that the matter shall be heard before a court consisting of the archbishop and a judge of the Supreme Court, who is nominated for that purpose by the Lord Chancellor. The bishop must be made a party to the proceedings before this court. The court gives a judgment on the matter which is final. In cases within this section where the bishop signifies his refusal in the manner provided, no proceeding in the nature of *quare impedit* or *duplex querela* can be taken.

In cases not provided for by the Benefices Act, 1898, the remedy by *quare impedit* or *duplex querela* may still be resorted to. Apparently, however, the remedy by *duplex querela* in the spiritual court may not proceed concurrently with the remedy by *quare impedit* in the temporal court (*l*); and the usual course in cases not

(*h*) 1 Burn. 24.
(*i*) *Ibid.* 159.
(*k*) *Gorham* v. *Bishop of Exeter* (1850), 15 Q. B. 52.
(*l*) *Walsh* v. *Bishop of Lincoln* (1874), L. R. 4 Adm. & Ecc. 242.

within the Benefices Act, 1898, in fact is, that upon the first delay or refusal of the bishop to admit his clerk, the adverse patron brings his *quare impedit* for the temporal injury done to his property, in disturbing him in his presentation, the patron, and not the clerk, being in all cases the plaintiff in *quare impedit*. The defendants to this action are the pretending patron and his clerk, and the ordinary, where all three of them are the disturbers; and although, where the delay arises from the bishop alone, as upon pretence of incapacity or the like, he only was the defendant, yet if there is another presentation set up, the pretending patron and his clerk had to be added as co-defendants with the bishop (*m*).

The action of *quare impedit* used formerly to be commenced by original writ, returnable, as a general rule, in the Court of Common Pleas only (*n*); and the writ directed the sheriff to command the defendants who disturbed the presentation (that is, in general, the bishop, patron, and clerk) to permit the plaintiff to present a fit person, without specifying whom, to the vacant church which he claimed to be in his gift, or else to show *why they hindered him* (*o*). But, by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), section 27, the action of *quare impedit*

(*m*) 7 Rep. 25; *Lancaster* v. *Lowe* (1605), Cro. Jac. 92; *Elvis* v. *Archbishop of York* (1619), Hob. 315.

(*n*) *Tolson* v. *Bishop of Carlisle* (1846), 3 C. B. 41; 5 C. B. 761; *Dyversité des Courtes*, ch. Bank le Roy.

(*o*) "Immediately on the suing "out of the *quare impedit*," says Blackstone (vol. iii. p. 248), "if the "plaintiff suspects that the bishop "will admit the defendant or any "other clerk pending the suit, he "may have a prohibitory writ "called a *ne admittas*"; and "if "the bishop doth, after the receipt "of this writ, admit any person, "even though the patron's right "may have been found in a *jus* "*patronatûs*, then the plaintiff, "after he has obtained judgment "in the *quare impedit*, may re- "move the incumbent, if the clerk "of a stranger, by *scire facias*, "and shall have a special action "against the bishop, called a *quare* "*incumbravit*, to recover the pre- "sentation, and also satisfaction "in damages for the injury done "him by incumbering the church "with a clerk pending the suit, "and after the *ne admittas* "received."

might be commenced by ordinary writ of summons issuing out of the Common Pleas; and the proceedings on the writ were assimilated to the proceedings in an ordinary action.

[The plaintiff in this action should, in his statement of claim, allege a title in himself or his ancestors, or in those under whom he claims, an actual presentation under that title, and a disturbance before action brought (*p*). After delivery of the statement of claim, the bishop and the clerk usually disclaim all title, save only the one as *ordinary* to admit and institute, and the other as presentee of the patron; and the patron alone is therefore left to defend the right. Indeed, it was a rule at the common law, that neither the ordinary nor the clerk should plead to the right of patronage; but, by the 25 Edw. III. (1352), st. 6, c. 7, the ordinary was enabled to plead thereto, provided he had himself collated by lapse; and the clerk also was enabled to plead thereto, provided he had been collated, or presented and instituted (*q*). And if they meant merely to deny that they had obstructed the presentation, they might so frame their defence (*r*); and such, in effect, is still the rule. But the bishop might, of course, also defend, on the ground that the clerk presented by the plaintiff was unfit, for want of learning or otherwise, to be instituted (*s*). The defendant patron may rely also on the defence of *plenarty*, viz., that, by virtue of his own presentation, the church was full for

(*p*) *Brickhead* v. *Archbishop of York* (1617), Hob. 197.

(*q*) 7 Rep. 26 a; *Storie* v. *Bishop of Winchester* (1850), 9 C. B. 62; 17 C. B. 653; Roscoe, *Real Actions*, 231, 239, 241.

(*r*) The mode of raising such defence has been to plead *ne disturba pas*, which was the general issue in *quare impedit*; but see now Ord. XIX. (1883), r. 15.

(*s*) *Bishop of Exeter* v. *Marshall* (1868), L. R. 3 H. L. 17; *Heywood* v. *Bishop of Manchester* (1884), 12 Q. B. D. 404; *Abergavenny* (*Marquis*) v. *Llandaff* (*Bishop*) (1888), 20 Q. B. D. 460; 61 & 62 Vict. c. 48 (Benefices Act, 1898), s. 2. See *ante*, p. 430.

six calendar months before the issue of the writ (*t*) ; or, if he desires only to deny that he has obstructed the presentation, he may plead simply that he did not obstruct it (*u*) ; and he may also traverse the title alleged by the plaintiff. But inasmuch as, in a *quare impedit*, both parties are in a manner plaintiffs, and either of them entitled to a judgment that he recover the presentation, and have a writ to the bishop for the admission of his clerk, therefore, if the defendant patron wishes to obtain a judgment of this description, and not merely a judgment discharging him from the action, he must, in addition to the traverse, set forth some matter showing title in himself (*x*). [And, upon the failure of the plaintiff, at the trial of a *quare impedit*, to make out his title, the defendant is put upon the proof of *his* ; that is, if he has so pleaded in his defence.

If, upon the trial, the right be found for the plaintiff, then three further points are to be inquired into,—(1.) Whether the church be full or not, and if it be, upon whose presentation it is full ; (2.) The yearly value of the church ; and (3.) Whether six calendar months have passed since the avoidance. All which matters are material to be ascertained, in order to determine the nature of the damages to which the plaintiff is entitled (*y*). For, at common law, no damages were recoverable in a *quare impedit* ; but, by the statute of Westminster the Second (13 Edw. I.), c. 5, if more than six calendar months have passed by reason of the disturbance of any person,—so that the bishop has presented by lapse, and the true patron has lost his presentation,—damages shall be adjudged against the disturber, to the amount of the

(*t*) Stat. Westm. 2, c. 5 ; Roscoe, *Real Actions*, pp. 234, 240.

(*u*) *Colt* v. *Bishop of Coventry* (1612), Hob. 140 ; *R.* v. *Bishop of Worcester* (1669), Vaughan, 53.

(*x*) *Tufton* v. *Temple* (1666), Vaughan, 1 ; *Carlisle* v. *Whaley* (1867), L. R. 2 H. L. 391, 409.

(*y*) 2 Inst. 362 ; 6 Rep. 49 a. ; *Poyner* v. *Chorleton* (1557), Dyer, 135 a.

[value of the church for two years; or, if the six calendar months have not passed, then damages to the value of the moiety of the church for one year (*z*).

The judgment for the plaintiff in a *quare impedit* is, that he recover his presentation, and have a writ to the bishop, commanding him to admit his clerk (*a*), and also that he recover his damages and costs; and such also (with the exception of the damages) is the judgment for the defendant, where he has made out his own title to present.] Formerly, indeed, no costs were recoverable by either party in *quare impedit*; but, by the 4 & 5 Will. IV. (1834), c. 39, where a verdict was given for the plaintiff, he was to have his costs in addition to his damages; and where a verdict was given against him,—or he discontinued or was non-suited,—he was to pay costs to the adverse party, subject only to this, that no judgment for costs was to be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the court or judge certified that he had probable cause for defending the action (*b*).

(II.) Secondly, Injuries to *personal* property, which are injuries either (A) to things in *possession*; or, (B) to things in *action*.

A. *Injuries affecting things in possession.*—These are either, (1) the deprivation (or amotion) of the possession, or, (2) the abuse or damage of the chattel, while the possession continues in the legal owner. The injury of deprivation of possession may consist either in the taking of the goods away unlawfully, or in their unlawful detention where the original taking was lawful, or in such other tortious acts as subject the owner to the loss

(*z*) 6 Rep. 51 a; 2 Inst. 362; *Henslow* v. *Bishop of Sarum* (1552), Dyer, 76 b.

(*a*) F. N. B. 38.

(*b*) *Edwards* v. *Bishop of Exeter* (1839), 6 Bing. N. C. 146. The statute of 1834 has been repealed by the Statute Law Revision Act (No. 2), 1882; but it is to be presumed that the rule applies in the new procedure.

of them, though the wrong-doer himself may be guilty neither of unlawful taking nor of unlawful detainer. Our present subject will therefore involve four several heads :—(1) the injury of unlawfully taking chattels from the owner ; (2) that of unlawfully detaining them from him ; (3) that of unlawfully depriving him of them, by means other than detention ; and, (4) that of doing damage to them while in his possession.

1. *Of an unlawful taking.*—The nature of this requires no illustration, and our attention, therefore, is to be chiefly directed to the remedy for it. The ordinary remedy is an action for *trover*, or wrongful conversion, if damages only are sought, or an action of *detinue* if the recovery of the specific goods taken is sought. These actions are more fully dealt with later. Another remedy for the restitution of the goods, together with damages for the loss sustained by their unjust invasion, is the action of *replevin*, an action which is confined (in modern practice) to that species of unlawful taking which is called a wrongful distress (*c*). The action of replevin is preceded by an application on the part of the owner, to the proper authority, to cause the goods taken to be *replevied*, that is, re-delivered to the owner, upon his giving such security as the law requires for trying the legality of the distress. An application for this purpose is made to the registrar of the county court for the district within which the distress was taken (*d*). The registrar, on receiving this application, causes the goods to be replevied accordingly by an officer of the court, and to be delivered to the owner, on his giving proper security to commence in the county court, within one month, an action of replevin against the distrainor, and to prosecute the action with effect and without delay, and to make

(*c*) Co. Litt. 145 b ; Vin. Ab. *Replevin* (B.) ; Com. Dig. *Action* (M. 6) ; *Mellor* v. *Leather* (1853), 1 El. & Bl. 619.

(*d*) County Courts Act, 1888, s. 133.

return of the goods, if (in the result) a return of the same shall be adjudged (*e*). But the owner is also entitled (at his option) to give security to commence the action in the High Court instead of in the county court; and in the latter case, he must do so within one week, instead of one month, and the security he gives will be to do so, and also to prosecute the action with effect and without delay, and to make return of the goods if a return shall be adjudged, and also (unless he shall obtain judgment by default) to prove that he had good ground for believing, either that the title to some corporeal or incorporeal hereditament the rent or value whereof exceeded 20*l.* by the year, or to some toll, market, fair, or franchise, was in question, or that the rent or damage, in respect of which the distress was made, exceeded 20*l.* (*f*). In case the action is commenced in the county court, the defendant may have it *removed* into the High Court, by writ of *certiorari*, or by order in the nature of such writ; to obtain which writ or order, the defendant applies to the High Court, giving security (to an amount not exceeding 150*l.*) to defend the action with effect, and to prove that he (the defendant) had good ground for believing to the effect already set forth in the case of an action by the replevisor (*g*).

The defence to the action of replevin may be, that the defendant never took the goods; but more often it admits the taking, and insists that the goods were lawfully taken, and claims a *return* of the goods. Such latter defence was formerly and still is sometimes called an *avowry;* or (if the distress was made not in the defendant's own right, but as servant for another) a *cognizance.* In reply, the plaintiff may pay money into court, but not so as to affect the security already given (*h*); or he may deny that any rent was due.

(*e*) County Courts Act, 1888, ss. 134, 136.

(*f*) Sect. 135.

(*g*) Sect. 137.

(*h*) Common Law Procedure Act, 1860, s. 24.

The judgment in replevin, when given in favour of the plaintiff, awards damages for the unlawful taking and detaining; and when given for the defendant, awards either a return of the goods, or, if the distress was for rent, then, at the option of the defendant, a recovery of the amount of the rent in arrear.

Another remedy for the unlawful taking of goods is an action of trespass *de bonis asportatis*, which is now generally called simply an action of trespass. By this action, the plaintiff does not recover the thing itself, but only damages for the loss of it.

[2. *Of an unlawful detainer.*—There may be an unjust *detainer* of another's goods, where the original taking was lawful enough. As if I distrain another's cattle damage-feasant, and, before they are impounded, he tenders me sufficient amends, my subsequent detention of them, after such tender, is wrongful, and he may have an action of *replevin* against me to recover them (*i*), together with damages for the *detention*. And if I lend a man a horse, and he afterwards refuses to restore it, I may recover possession by action of *detinue* (*k*).

[In the action of *detinue* the plaintiff bases his claim on the unlawful detention by the defendant of his chattel; and if he succeeds in the action the judgment is that he do recover the chattel, or if it cannot be had, its value, which is assessed by the judge or jury, and also certain damages for detaining the same.] On this judgment, the defendant had formerly the option to re-deliver the goods themselves, or else to render their value; but, now, the plaintiff may have an order for the restitution of the specific goods, to be enforced by a special writ of execution, called a *writ of delivery* (*l*). And, it being the object of detinue to obtain, if possible, specific restitution, the

(*i*) F. N. B. 89.

(*k*) F. N. B. 138; *Jones* v. *Dowle* (1841), 9 M. & W. 19; *Williams* v. *Archer* (1847), 5 C. B. 318; *Reere* v. *Palmer* (1858), 5 C. B. (N.S.) 84.

(*l*) *Chilton* v. *Carrington* (1855), 15 C. B. 730; Ord. XLVIII. rr. 1, 2.

action will not lie for money, corn, or the like, unless it be in a bag or a sack; for then, and not otherwise, it may be distinguishably marked.

The action of detinue was formerly subject to the incident of *wager of law* (*vadiatio legis*), a proceeding which consisted in the defendant's discharging himself from the claim on his own oath, bringing with him at the same time into court eleven of his neighbours, to swear that they believed his denial to be true; which relic of a very ancient institution continued to subsist among us till abolished by the Civil Procedure Act, 1833, s. 13 (*m*). And, inasmuch as wager of law exposed plaintiffs in detinue to great disadvantage, it had the effect of throwing that action almost entirely out of use, and of introducing in its stead the action of *trover and conversion*, which last mentioned action became therefore the recognised and usual remedy for goods wrongfully *detained*. At the present time the actions of *detinue* and of *trover* are both in common use; the former being used when the recovery of the specific chattel is wanted, and the latter when damages only are sought.

[The action of *trover* originally lay, only for the recovery of damages against such person as had *found* another's goods, and wrongfully *converted* them to his own use; from which finding and converting it derived its name. But the freedom of the action from wager of law, coupled with other technical considerations, gave it so considerable an advantage over the action of detinue, that it was at length permitted to be brought against anyone who had in his possession, by any means whatsoever, the personal goods of another, and refused to deliver them up when demanded.]

Under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the allegation of the *finding* was omitted altogether from the declaration, that statute providing that the action might be sustained by showing, that the defendant wrongfully *converted* the goods to his own use,

(*m*) *King* v. *Williams* (1824), 2 B. & C. 538.

or wrongfully deprived the plaintiff of their use and possession (*n*); and it is, in fact, enough to prove, that the goods belonged to the plaintiff, and came to the defendant's possession, and that he refused or neglected, upon request, to deliver them up, a refusal on request being evidence of a conversion (*o*). But the right of action is not complete, until there has been a demand followed by a refusal (*p*).

3. The injury of dispossessing another of his personal chattels may also be effected otherwise than by an unlawful taking or wrongful detainer. Thus, I may be deprived either of goods or of money from my having delivered over the goods, or lent the money, in consequence of a representation made by one person as to the circumstances or character of another, which representation, if it was untrue to the knowledge of the person by whom it was made, is an injury for which I may maintain an action against him (*q*); and the law is the same in the case of any other injury occasioned by the *fraudulent* misrepresentation of another (*r*). But such an action is essentially founded on the fraud or deceit of the party charged; and therefore it will not lie in any case where the representation, though untrue in fact, was made *bonâ fide* (*s*). By

(*n*) Sect. 49, sched. (B.) 28; *Munster* v. *The South Eastern Railway Company* (1858), 4 C. B. (N.S.) 676.

(*o*) 10 Rep. 56; *Green* v. *Dunn* (1812), 3 Camp. 215 (n.); *Rushworth* v. *Taylor* (1842), 3 Q. B. 699; *Heald* v. *Carey* (1852), 11 C. B. 977; *Burroughes* v. *Bayne* (1860), 5 H. & N. 296.

(*p*) *Spackman* v. *Foster* (1883), 11 Q. B. D. 99.

(*q*) *Foster* v. *Charles* (1830), 6 Bing. 396; 7 Bing. 105.

(*r*) *Pasley* v. *Freeman* (1789), 3 T. R. 51; 2 Smith L. C., 11th ed., 66; *Pewtriss* v. *Austen* (1816), 6 Taunt. 522; *Taylor* v. *Ashton* (1843), 11 M. & W. 401; *Behn* v. *Kemble* (1859), 7 C. B. (N.S.) 260; *Mullett* v. *Mason* (1866), L. R. 1 C. P. 559.

(*s*) *Derry* v. *Peek* (1889), L. R. 14 App. Ca. 337; *Angus* v. *Clifford*, [1891] 2 Ch. 449; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491. In some cases an action may lie apart from fraud, when some warranty can be proved, or the defendant is bound by an estoppel. (*Low* v. *Bouverie*, [1891] 3 Ch. 82; *Oliver* v. *Bank of England*, [1902] 1 Ch. 610. Affd. in H. L., *sub. nom.* *Starkey* v. *Bank of England*, [1903] A. C. 114.)

the Statute of Frauds Amendment Act, commonly called Lord Tenterden's Act (9 Geo. IV. c. 14), s. 6, no action may be brought to charge any one by reason of his representation concerning the character, ability, or dealings of another, with the intent that such other person may obtain credit, money, or goods, unless such representation be made in *writing*, and signed by the party to be charged therewith (*t*). I may also be deprived of money to which I am entitled under the judgment of a court of law, *e.g.*, by the wrongful omission of the sheriff to seize the goods of the defendant, under the writ of execution which I have sued out upon the judgment; and in such event, my remedy is by action on the *case* against the sheriff (*u*).

4. An owner of personal property may also be injured by its *abuse or damage;* and of this injury, hunting his deer, shooting his dogs, or poisoning his cattle, may be mentioned as examples. And taking from the value of his chattels in anywise, or making them in a worse condition than before, by any negligent or wilful mischief, will also amount to this injury. Moreover, personal property being, sometimes, of an intangible or incorporeal nature,—as in the case of a copyright or patent right,—the piracy of a literary composition, or the infringement of a patent, will be a wrong falling under this head of injuries; and of a similar description is the injury committed by one manufacturer who sells his goods under the *trade mark* (*x*) or trade name (*y*) of another. For an infringement of such

(*t*) *Haslock* v. *Fergusson* (1837), 7 A. & E. 86; *Swann* v. *Phillips* (1838), 8 A. & E. 457; *Pilmore* v. *Hood* (1838), 5 Bing. N. C. 97; *Deraux* v. *Steinkeller* (1839), 6 Bing. N. C. 84; *Tatton* v. *Wade* (1856), 18 C. B. 371; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301.

(*u*) *Williams* v. *Mostyn* (1838), 4 M. & W. 145; *Guest* v. *Elwes* (1836), 5 A. & E. 118. This remedy is now subject to the provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); see *post*, p. 452.

(*x*) *Sykes* v. *Sykes* (1824), 3 B. & C. 541; *Burgess* v. *Hills* (1858), 26 Beav. 244; *Leather Cloth Company* v. *American Leather Cloth Company* (1865), 11 H. L. C. 523.

(*y*) *Birmingham Vinegar Brewery Co.* v. *Powell*, [1897] A. C. 710.

rights as these, the plaintiff may by his action not only recover damages for the injury already suffered, but may also obtain an *injunction* restraining the wrongdoer from the further invasion of the right ; and, in lieu of damages, he may (at his option) have an account of the profits derived from the wrongful sale, and obtain payment of the amount appearing due on such account (*z*).

B. *Injuries affecting things in action*,—in other words, injuries affecting such rights as are founded in and arise from *contracts*. It will be remembered, that contracts may be either under seal or by parol, verbal or written, express or implied ; and for the *breach of contract* of whatever kind it be, an action will lie (*a*). It is expedient, therefore, now to advert shortly to some particular contracts of common occurrence, and to state the remedies for their breach :—

1. As regards the breach of *covenants in leases*, the remedy for either party is by action on the covenant ; but, in the case of a covenant to *pay rent*, the breach of it may be redressed either by action on the covenant or by action of debt ; and although for a freehold rent, viz., a rent issuing out of a freehold estate, whether of inheritance or for life, no action of debt lay, by the common law, *during the continuance of the freehold out of which it issued* (*b*), yet such action may now be brought to recover freehold rents, if reserved on a lease for life only (*c*). And, since the abolition of real actions by the Real Property Limitation Act, 1833, debt will also now lie for the recovery of a rent *of inheritance*, and presumably, therefore, also for arrears of a rentcharge or annuity, granted

(*z*) *Fox* v. *Hill* (1858), 2 De Gex & J. 353 ; *Badische, etc.* v. *Levinstein* (1883), 24 Ch. D. 156 ; *Chatterton* v. *Care* (1878), L. R. 3 App. Ca. 483 ; *Saxlehner* v. *Apollinaris Company*, [1897] 1 Ch. 893.

(*a*) *Vide sup.* vol. II. pp. 95, 96.

(*b*) 3 Bl. Com. 232.

(*c*) *Ibid.* ; Landlord and Tenant Act, 1709 ; Ecclesiastical Leases Act, 1765.

in fee, or in tail, or for life (*d*), and, *semble*, although the arrears claimed to be recovered in the action exceed the whole profits accruing from the lands charged therewith (*e*).

2. Under a contract of *sale* of goods, the buyer may recover damages for the non-delivery, the measure of the damages being the estimated loss directly and naturally resulting in the ordinary course of events from the breach of contract; which estimated loss will, when there is a market for the goods, be *primâ facie* the difference between the contract price and the market price (*f*). The buyer may also recover damages for breach of warranty, the measure of damages being again the estimated loss, which estimated loss is *primâ facie* the difference between the value of the goods at the time of the delivery and the value they would then have had if they had answered to the warranty (*g*). Also, if the action be brought for breach of contract to deliver specific goods, then, by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), section 52, repealing (but re-enacting with simplifications and amendments) the like provisions contained in the Mercantile Law Amendment Act, 1856, sections 1, 2, the court may, upon the application of the plaintiff, give judgment for the specific performance of the contract, that is, for the delivery of the specific goods, without allowing the defendant the option of retaining them on payment of the damages for their non-delivery. Upon such a judgment, execution may afterwards issue for the delivery of the specific goods sold; and, in default of delivery, the sheriff will distrain the defendant by all his lands and chattels, until he deliver the goods, a species of relief which is now

(*d*) Bac. Abr. tit. *Annuity and Rentcharge*: *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368; *Searle* v. *Cooke* (1890), 43 Ch. D. 519.

(*e*) *Pertwee* v. *Townsend*, [1896] 2 Q. B. 129.

(*f*) Sale of Goods Act, 1893, s. 51.

(*g*) *Ibid.* s. 53.

obtainable under the writ of delivery provided by the Judicature Acts (*h*).

If under a contract of sale it is the buyer who breaks the contract of sale, the seller may have his action against him for the price of the goods sold (*i*) ; or he may recover damages against the buyer for his refusal to accept the goods sold, the measure of the damages in such case being the estimated loss directly and naturally resulting in the ordinary course of events from the breach,—which loss (when there is a market for the goods) will be *primâ facie* the difference between the contract price and the market price, at the time when the goods ought to have been accepted (*k*).

3. With regard to the contract of the *loan of money*, and other analogous pecuniary claims, such as for *money paid* by the plaintiff for the defendant at his request, and for money *received* by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff, upon an *account stated* between them, it being sometimes difficult to determine, upon a given state of facts, into which of these claims the plaintiff's case properly resolves itself,—the remedy for the breach of any of these contracts is an action which used to be and still sometimes is called an action of *indebitatus assumpsit*.

4. As regards the contract of *partnership*, questions of account between partners are, in general, settled in the Chancery Division, and not in the King's Bench Division. But an action may be brought, in either division, by one partner against the other, on an express agreement to do or forbear from some particular act not involving a question of account (*l*), or on an account stated, or agreement

(*h*) Ord. XLVIII. (1883), rr. 1, 2; App. H., No. 10.

(*i*) Sale of Goods Act, 1893, s. 49.

(*k*) *Ibid.* s. 50.

(*l*) *Bedford* v. *Brutton* (1834), 1 Bing. N. C. 399.

to pay a liquidated balance, or the like (*m*) : and though one partner cannot bring a legal action against his co-partner for appropriating to his own exclusive use a chattel of the partnership, yet, if one of the partners has *destroyed* such a chattel, the other may maintain an action in respect thereof (*n*).

5. As to the contract of *guarantee*, the remedy by the surety against the principal debtor, where the former has been compelled to make a payment under the guarantee, is for money paid by the former to the use of the latter ; and any one of several co-sureties, who has paid more than his rateable proportion, is entitled to claim contribution from the other or others.

6. Upon *bonds*, the remedy of the obligee, in case of breach of contract by the obligor, is by action for the amount of the penalty. But the plaintiff is allowed to recover no more, upon a bond conditioned for the payment of money, than the principal sum in respect of which it was given, together with interest and costs (*o*) ; nor, upon a bond conditioned for the performance of any other act, more than shall be assessed by way of damages (*p*).

7. As regards obligations to pay money, arising from a judgment obtained by one man against another, or arising under a penal Act of Parliament, and made recoverable either by the Crown, or by the party aggrieved, or by a common informer, there is deemed to be a promise to pay, for the breach of which either the judgment creditor or (as the case may be) the Crown, the party aggrieved, or the common informer, has a right of action on the judgment, or on the penal statute, respectively. In the latter case, the remedy is commonly called

(*m*) Chitty, *Cont.*, 13th ed., p. 96, *Smith* v. *Barrow* (1788), 2 T. R. 476.

(*n*) Co. Litt. 200 a, b ; Bull. N. P. 34 ; *Martyn* v. *Knowllys* (1799), 8 T. R. 145.

(*o*) 4 & 5 Anne (1705), c. 3.

(*p*) 8 & 9 Will. 3 (1696), c. 11.

a penal action, or (where one part of the forfeiture is given to the Crown, and the other part to the informer) a *popular* or *qui tam* action, because it is brought by a person *qui tam* pro domino rege *quam* pro se ipso sequitur (*q*); but in the case of a penal action, the plaintiff is sometimes required to have first obtained the *fiat* of the Attorney-General (*r*).

Thirdly, Injuries affecting Rights in Private Relations.

This class of injuries may be considered as comprising such as may be done to persons under the four following relations,—husband and wife; parent and child; guardian and ward; and master and servant.

I. [The injuries that may be offered to a man, considered as a *husband*, are principally three, namely:—*abduction* (or taking away his wife); *adultery* (or criminal conversation with her); and *beating* or otherwise abusing her.

And, first, *abduction* may be either by fraud and persuasion, or by open violence, though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by action *de uxore raptâ et abductâ* (*s*). This action lay at the common law; and in this action the husband recovered, not the possession of his wife, but damages for taking her away (*t*). And by the statute of Westminster the First (3 Edw. I.), c. 13, the offender might also have been imprisoned for two years, and fined at the pleasure of the Crown; so that, by the old law, both the Crown and the husband might have this action. A husband is, also, entitled to recover damages against any who persuade and entice his wife to live separate from him without a sufficient

(*q*) *Bradlaugh* v. *Clarke* (1883), L. R. 8 App. Ca. 354.

(*r*) Public Health (Officers) Act, 1884, s. 2.

(*s*) F. N. B. 89.

(*t*) 2 Inst. 434.

[cause (*w*). And the old law was very strict in this particular, so much so, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted, and in danger of being lost or drowned; but he might carry her behind him on horseback to market, or to a justice of the peace, for a warrant against her husband, or to the spiritual court, to sue for a divorce (*x*). And an action will still lie at the suit of a husband against anyone who entices away or harbours his wife; but it is a good defence to such action for the defendant to show that he acted from motives of humanity (*y*).

Secondly, *adultery* is not punishable by our law as a crime, its penal correction being left to the spiritual courts, which may proceed against the offender *pro salute animæ* (*z*); but, considering it as a civil injury, the law (as it stood prior to the year 1858) gave satisfaction for it to the husband, by an action for *criminal conversation*. In that action, the damages recovered were regulated by the circumstances of each particular case (*a*), the rank and fortune of the plaintiff and defendant, the relation or connection between them, the degree and nature of the seduction, the previous behaviour and character of the wife, the manner in which she had been previously treated by the husband, the husband's obligation (by settlement or otherwise) to provide for children probably spurious, being all taken into consideration;] and the damages would be mitigated, where the husband was proved to have been himself first guilty of conjugal infidelity (*b*). If it appeared that he connived at or consented to his own dishonour (*c*), or lived, at the time of the adultery, in a state of absolute and permanent separation from his wife,

(*w*) Bull. N. P. 78.

(*x*) Bro. Abr. tit. *Trespass*, 207, 213, 440.

(*y*) *Philp* v. *Squire* (1791), Peake, 115; *Berthon* v. *Cartwright* (1795), 2 Esp. 480.

(*z*) *Vide sup.* p. 347.

(*a*) Bull. N. P. 26.

(*b*) *Bromley* v. *Wallace* (1803), 4 Esp. 237.

(*c*) *Bennett* v. *Allcott* (1787), 2 T. R. 166.

the action would be wholly barred (*d*). This action could not be maintained, without proving a marriage in fact; though, in other cases, reputation and cohabitation are, as the general rule, sufficient evidence of marriage (*e*). But the action for criminal conversation is now altogether abolished, and its place is supplied by a different form of proceeding, it having been provided, by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), section 33, that a husband may, on a petition for a divorce, claim *damages* from any person, on the ground of his having committed adultery with the wife of the petitioner; and the claim for damages is heard and tried on the same principles, and according to the same rules, as formerly applied to an action for criminal conversation. But the Act has also introduced the new principle, of giving power to the court to direct, after the verdict has been given, in what manner the damages shall be paid or applied; and, in particular, to direct that the whole or a part thereof shall be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife (*f*); and this jurisdiction may be exercised in favour of the innocent party, although there are no children of the marriage (*g*). And the court may even allow alimony, upon special grounds, to the guilty wife (*h*).

Thirdly, for the injury of *beating* a man's wife, or otherwise ill-using her, the law distinguishes. For, if it be a common assault, battery, or imprisonment, the law gives a remedy to recover damages in an action brought in the names of the husband and wife *jointly;* but if the beating or other maltreatment be such that the husband

(*d*) *Weedon* v. *Timbrell* (1793), 5 T. R. 357.

(*e*) *Morris* v. *Miller* (1767), 4 Burr. 2057.

(*f*) *Keats* v. *Montezuma* (1859), 1 Swab. & Tr. 334; *Pounsford* v. *Bulpin* (1861), 2 Swab. & Tr. 389; *Bent* v. *Footman*, *ib.* 392.

(*g*) Matrimonial Causes Act, 1878; *Yglesias* v. *Yglesias* (1879), 4 P. D. 71.

(*h*) *Dunn* v. *Dunn* (1888), 13 P. D. 91; *Ashcroft* v. *Ashcroft*, [1902] P. 270.

loses for a time or permanently the comfort and services of his wife (*per quod consortium amisit*), the law then gives the husband a *separate* remedy for this ill-usage, in which he must prove, by way of *special* damage, that he has thus lost the benefit of his wife's society (*i*). And the two claims may now be joined in one and the same action (*j*).

II. With respect to the relation of *parent* and child, it seems to be now clearly established, that there is no instance in which an injury can be sustained by a parent *merely in his parental character*; and that, in the case of a battery or other ill-treatment inflicted on his child, the action for redress must be brought in the name of the child (*k*). If, however, the parent can prove that the child rendered him some service, he may have an action based on the loss of such service (*l*).

III. [An injury may be done to a man as a *guardian*, by stealing or ravishing away his ward. For though guardianship in chivalry is now totally abolished, and that was the only kind of guardianship beneficial to the guardian, yet the guardian in socage was always entitled to an action of ravishment, if his ward were taken from him (*m*); but he accounts to the ward for the damages which he recovers (*n*). And by the 12 Car. 2 (1660), c. 24, the testamentary guardian also had this remedy, subject to the like liability to account to his ward (*o*). But a more speedy and summary method of redressing all complaints, relative to wards and guardians, is now obtained in the Chancery Division of the High Court, which has

(*i*) *Guy* v. *Livesey* (1618), Cro. Jac. 501; *Hyde* v. *Scyssor* (1619), *ib.* 538.

(*j*) Order XVIII. (1883), rr. 1, 3 5.

(*k*) *Hall* v. *Hollander* (1825), 4 B. & C. 660.

(*l*) See *post*, p. 450.

(*m*) F. N. B. 139.

(*n*) Hale on F. N. B. 139.

(*o*) *Eyre* v. *Countess of Shaftesbury* (1722), 2 P. Wms. 103.

[the superintendent jurisdiction of all the infants in the kingdom (*p*).

IV. To the relation of *master and servant*, there are several species of injuries incident. For example, knowingly retaining a man's hired servant before his time is expired, is an injury to the master; for every master has, by the contract of service, purchased for a valuable consideration the services of his domestics for a limited time, and for this injury, the law has given the master a remedy in damages against the wrongdoer (*q*). The master may, of course, always have an action against the servant, for non-performance of his agreement (*r*); but not against the new master if he was not apprised of the former contract, unless, indeed, he refuses to restore the servant upon demand (*s*).

Another injury to this relation, is beating, confining, or disabling the servant, so that he is not able to perform his work, which injury depends upon the same principle as the last, viz., the property which the master has, by the contract of service, acquired in the labour of the servant; and in this case, besides the action which the servant himself may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action (*t*), in which he must allege and prove the special

(*p*) Judicature Act, 1873, ss. 16, 34.

(*q*) *Evans* v. *Walton* (1867), L. R. 2 C. P. 615; *Lumley* v. *Gye* (1853), 2 E. & B. 216; *Bowen* v. *Hall* (1881), 6 Q. B. D. 333; *Quinn* v. *Leathem*, [1901] A. C. 495.

(*r*) F. N. B. 167; *Keane* v. *Boycott* (1795), 2 H. Bl. 511. It is an actionable wrong for several persons to conspire without just cause or excuse to injure another by preventing the latter from obtaining employment, if he is thereby so prevented (*Quinn* v. *Leathem*, *supra*). But it appears that A. has no cause of action against B merely because B. persuades C. not to employ him (*Allen* v. *Flood*, [1898] A. C. 1; *Gunter* v. *Astor* (1819), 4 Moo. 12)

(*s*) F. N. B. 167; Winch, 51.

(*t*) *Chamberlain* v. *Hazlewood* (1839), 5 M. & W. 515.

[damage he has sustained by the beating of his servant, *per quod servitium amisit* (*u*).] And, as we have already seen, it is in this manner alone, that, by our law, a parent is enabled to claim redress for a battery or other ill-usage inflicted on his child; or even for the seduction of his daughter. That is to say, the parent must, in either case, sue as the master of his child, the child being for this purpose regarded as his servant: and, therefore, unless a parent is able to prove, that his child was in his service at the time the injury was committed, he is without remedy (*x*). From which it follows, that he is without remedy when the child resided, at the time, with another master; though that master may on his part maintain the action (*y*). But where a parent is plaintiff in a case of seduction, the courts incline to relieve him as much as possible from any difficulty connected with proof of the loss of service, considering the action as brought *in substance* to repair the outrage done to the parental feelings; and it has been held, therefore, that the mere residence of the child with him at the time, affords sufficient proof that the relation of master and servant existed between them (*a*). And the jury, in assessing the damages, will take into account the dishonour done to the plaintiff, in addition to the loss of service (*b*). No action for seduction can, of course, be maintained by the daughter herself, for *volenti non fit injuria*; and the action will not lie against the master himself for the seduction by him (*c*). Nor will the seducer

(*u*) 9 Rep. 113; 10 Rep. 130.

(*x*) *Whitbourne* v. *Williams*, [1901] 2 K. B. 722; *Hall* v. *Hollander* (1825), 4 B. & C. 660; *Manley* v. *Field* (1859), 7 C. B. (N.S.) 96; *Evans* v. *Walton* (1867), L. R. 2 C. P. 615; *Hedges* v. *Tagg* (1872), L. R. 7 Ex. 283.

(*y*) *Id.*; *Thompson* v. *Ross* (1859), 5 H. & N. 16.

(*a*) *Jones* v. *Brown* (1794), 1 Esp. 217; *Torrence* v. *Gibbins* (1843), 5 Q. B. 297; *Rist* v. *Faux* (1863), 4 B. & S. 409; *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599.

(*b*) Stark. *Ev.* part iv. p. 1309.

(*c*) *Speight* v. *Oliviera* (1819), 2 Stark. 493; *Whitbourne* v. *Williams*, *supra*.

be liable to either master, where the act of seduction falls in the period of the girl's service with one, and the illness falls in the period of service with another (*d*).

Fourthly, Injuries affecting Public Rights.

The only injuries which now remain to be noticed are those sustained by a man in respect of his *public* rights; but injuries of this description are, in general, of such a nature as to be remediable, not so much by action, as by indictment or information, or by some of those prerogative writs, to which we shall have occasion to advert hereafter. Yet where *special damage* is sustained by an individual, as in consequence of the obstruction of a highway (*e*), or where the returning officer at a parliamentary election refuses to receive the vote of an individual, so that the election takes place without his being allowed to exercise his elective right (*f*),—in either of these cases, there is a right of action, in which damages are recoverable. By the Parliamentary Elections Act, 1868, section 48, "if any "returning officer wilfully delays, neglects, or refuses, "duly to return any person who ought to be returned to "serve in parliament for any county or borough, such "person may,—in case it has been determined on the "hearing of an election petition under the Act that such "person was entitled to have been returned,—sue the "officer, . . . and shall recover double the damages "he has sustained by reason thereof, together with full "costs of suit; provided such action be commenced "within one year after the commission of the act on "which it is grounded, or within six months after the "conclusion of the trial relating to such election."

(*d*) *Davies* v. *Williams* (1847), 10 Q. B. 725.

(*e*) *Wilkes* v. *Hungerford Market* (1835), 2 Bing. N. C. 281.

(*f*) *Ashby* v. *White* (1703), Ld. Raym. 938; 1 Smith L. C., 11th ed., 240; *Pryce* v. *Belcher* (1846), 3 C. B. 58; 4 C. B. 866.

But regarding this action, and generally regarding all actions brought against public authorities or officers, in respect of any alleged breach or failure of duty on their parts, it has now been provided, by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), that the action must be commenced within six months after the cause of action arose. And if the action be for damages, then tender of sufficient amends before action, or tender or payment into court of a sufficient amount after action, or any undue haste in the plaintiff in commencing his action whereby tender of amends before action was prevented, will in general have this effect, namely, that if the plaintiff lose the action, he will have to pay the defendant's costs between solicitor and client; and if he succeed in the action, he will, in general, obtain only his costs up to the date of payment into court, paying in that case the defendant's subsequent costs as between solicitor and client (*g*).

(*g*) *Fidding* v. *Morley Corporation*, [1899] 1 Ch. 1; *Smith* v. *Northleach Rural Council*, [1902] 1 Ch. 197; *Ambler* v. *Bradford Corporation* (1902), 71 L. J. Ch. 744.

CHAPTER VIII.

OF EQUITY IN ITS RELATION TO LAW.

It has been already stated, that Equity has, from an early time, constituted a large and important portion of our juridical system—a portion which was distinct from the common law, and which, until quite recently, was administered in its own peculiar courts.

Various attempts were made in the seventeenth and eighteenth centuries to embody in a single phrase this distinction between the legal and the equitable jurisdiction ; but none of these attempts can be said to have been successful.

1. Thus, in the first place it was said, that it was the business of equity to abate the rigour of the common law ; but there were many cases where the rigour of the law produced a real injustice, and equity did not interfere. For example, in the case of a bond creditor, whose debtor devised away his real estates, and so defeated him of his debt, equity did not interpose ; also, land descended or devised was not liable for the simple contract debt of the deceased, even though such debt might have been (in fact) the very purchase money payable for the land ; a father could not succeed to the real estate of his son, and lands would descend to a remote relation of the whole blood, or even escheat to the lord, but would not (by descent) go to the half-blood, even to a brother. But in none of these cases would equity have interfered, unless there was some circumstance added, which equity would regard as a ground for its interposition.

2. Again, it was said, that equity determined according to the spirit of the rule, and not according to the strictness

of the letter; but so also did the law, both being equally bound, and equally professing, to interpret statutes according to the true intent of the legislature, and documents according to the true intent of the parties. All cases cannot be foreseen: and some cases therefore there must always be which will fall within the meaning, though not within the words of the legislature, and *vice versâ*; and with reference to these, they are sometimes said to fall within, or to be *out* of, the *equity* of the Act of Parliament, meaning by equity as thus used nothing but the sound interpretation of the law. But there is not a single rule of interpreting a statute that is not equally used both at law and in equity; the construction must in both be the same, each endeavouring to fix and adopt the true sense of the enactment in question, and neither being able to enlarge, diminish, or alter that sense, in a single tittle.

3. It was often said that *fraud*, *accident*, and *trust*, were the proper and peculiar objects of equity; and yet every kind of *fraud* was equally cognisable at law, and many *accidents* were also relieved against at law,—as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which made it impossible to perform conditions literally, and a multitude of other contingencies. Also, some frauds or accidents could not be relieved against, even in equity; as, for example, the accident of a devise ill executed. And, as regarded trusts, although *technical trusts* were peculiarly appropriate to equity, yet there were trusts which always were cognizable at law,—*e.g.*, deposits, and all manner of bailments.

4. Again, it was sometimes said, that equity was not bound by precedents, but acted upon the opinion of the judge, founded on the circumstances of every particular case (*a*);

(*a*) Selden (*Table Talk*, tit. *Equity*) says:—"For *law* we have "a measure—know what to trust "to; *equity* is according to the "conscience of him that is chancellor, . . . 'Tis . . . as if they "should make the standard for the "measure . . . a chancellor's foot. "What an uncertain measure "would this be!"

but in truth the equitable jurisdiction has been, for the last century and longer, bound down by precedents from which it does not depart.

These inexact views of equity were perhaps excusable in the infancy of our courts of equity, before their jurisdiction was fully settled; but the systems of jurisprudence, both at law and in equity, have long been equally positive systems, and the two systems are also now in strict accordance with each other.

It must, however, be admitted, that equity and law, as administered previously to the recent changes, were not, in the exercise of their concurrent jurisdiction, consistent in some things; so that the abuse occasionally arose, that a different rule obtained, according as the remedy of the suitor was at law or in equity. It was for this reason that the framers of the Judicature Acts seized the occasion of the union of the several courts, whose jurisdiction was thereby transferred to the High Court of Justice, to amend and declare the law to be administered in England, as to certain matters respecting which such discrepancy existed. Accordingly, these Acts have expressly declared, among other changes of minor importance, that for the future:—(1.) an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon a tenant for life, any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate; (2.) there shall not be any merger, by operation of law only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity; (3.) a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which the mortgagee shall have given no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of

any trespass or other wrong relative thereto, *in his own name* only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person; (4.) any absolute assignment by writing under the hand of an assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed) to transfer the *legal* right thereto from the date of such notice, together with all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; (5.) stipulations in contracts as to time or otherwise which, before the Act, would not have been deemed to be (or to have become) of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have theretofore received *in equity;* (6.) in questions relating to the custody and education of infants, the rules of *equity* shall prevail; and that (7.) generally, in all matters not thereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law, with reference to the same matter, the rules of *equity* shall prevail (*b*).

Such, then, being the parity of law and reason which governs both systems, wherein (it may be asked) does their essential difference consist? And to this, the answer is, that the difference principally consists, in the subjects over which they exercise jurisdiction; in the kind of relief they administer; and in the modes of proceeding they pursue respectively.

(*b*) Judicature Act, 1873, s. 25.

First, *as to the Subjects of Jurisdiction.*—Some general idea of the nature of equitable business may be gained from that provision of the Judicature Acts which specifically assigns to the Chancery Division of the High Court of Justice the following causes and matters:—1. The administration of the estates of deceased persons; 2. The dissolution of partnerships, or the taking of partnership or other accounts; 3. The redemption and foreclosure of mortgages; 4. The raising of portions, or other charges on land; 5. The sale and distribution of the proceeds of property subject to any lien or charge; 6. The execution of trusts, charitable or private; 7. The rectification, setting aside, or cancellation of deeds or other written instruments; 8. The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; 9. The partition or sale of real estates; and 10. The wardship of infants and the care of infants' estates (*c*).

But the above subjects do not include the whole of the jurisdiction which was transferred to the High Court of Justice from the old Court of Chancery; and therefore the Judicature Acts proceed further to assign to the High Court (Chancery Division) all causes and matters, arising under any Act of Parliament whereby *exclusive* jurisdiction in respect thereof had been given to the Court of Chancery, or to any judge or judges thereof. Consequently, the jurisdiction of the Chancery Division of the High Court of Justice naturally divides itself into two parts:—The first consisting of that which it derives from the transfer to it of the several specific matters above enumerated, all of which arose out of the gradual growth of the equitable jurisdiction; and the other consisting of the jurisdiction which it derives from the divers miscellaneous enactments, which, in divers causes and matters, conferred exclusive jurisdiction on the former Court of

(*c*) Judicature Act, 1873, s. 34.

Chancery (*d*). The general nature of the subjects falling within this jurisdiction will be explained in the following chapters.

(*d*) See (among other statutes) *Burial Acts* (15 & 16 Vict. (1852), c. 85; 16 & 17 Vict. (1853), c. 134; 17 & 18 Vict. (1854), c. 87; 18 & 19 Vict. (1855), c. 128; 20 & 21 Vict. (1857), c. 81; 22 Vict. (1859), c. 1; 23 & 24 Vict. (1860), c. 64; 25 & 26 Vict. (1862), c. 100; 34 & 35 Vict. (1871), c. 33). *Cestui que Vie Act* (6 Ann. (1707), c. 72). *Charitable Trusts Acts* (16 & 17 Vict. (1853), c. 137; 18 & 19 Vict. (1855), c. 124; 32 & 33 Vict. (1869), c. 110). *Mortmain and Charitable Uses Acts* (51 & 52 Vict. (1888), c. 42; 54 & 55 Vict. (1891), c. 73). *Charitable Trustees Incorporation Act*, 1872 (35 & 36 Vict. c. 24). *Church Building Act*, 1845 (8 & 9 Vict. c. 70). *Companies Acts*, 1862 to 1900 (25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131; 33 & 34 Vict. c. 104; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 Vict. c. 19; 53 & 54 Vict. cc. 62, 63, 64; 56 & 57 Vict. c. 58; 61 & 62 Vict. c. 26; and 63 & 64 Vict. c. 48). *Copyhold Acts* (4 & 5 Vict. (1841), c. 35; 15 & 16 Vict. (1852), c. 51; 21 & 22 Vict. (1858), c. 94; 50 & 51 Vict. (1887), c. 73; and 57 & 58 Vict. (1894), c. 46). *Conveyancing Acts*, 1881 to 1892 (44 & 45 Vict. c. 41; 45 & 46 Vict. c. 39; 55 & 56 Vict. c. 13). *Custody of Infants Act* (36 & 37 Vict. (1873), c. 12). *Guardianship of Infants Act* (49 & 50 Vict. (1886), c. 27). *Custody of Children Act* (54 & 55 Vict. (1891), c. 3). *Defence Acts* (5 & 6 Vict. (1842), c. 94; 22 Vict. (1859), c. 12; 23 & 24 Vict. (1860), c. 112). *Ordnance Board Transfer Act*, 1855 (18 & 19 Vict. c. 117), and *Defence Act Amendment Act*, 1864 (27 & 28 Vict. c. 89). *Debts and Liabilities* (13 & 14 Vict. (1850), c. 35 (repealed by *Statute Law Revision Act*, 1883, but see *R. S. C. Order* 34, r. 8)); and *Law of Property Amendment Act*, 1860 (23 & 24 Vict. c. 38). *Ecclesiastical Houses of Residence Act*, 1842 (5 & 6 Vict. c. 26), and *Episcopal and Capitular Estates Act*, 1851 (14 & 15 Vict. c. 104). *Fines and Recoveries Act* (3 & 4 Will. 4 (1833), c. 74). *Grammar Schools Act* (3 & 4 Vict. (1840), c. 77). *Inclosure Act*, 1845 (8 & 9 Vict. c. 118). *Judgments Act* (27 & 28 Vict. (1864), c. 112). *Improvement of Land Act* (27 & 28 Vict. (1864), c. 114). *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18). *Legacy Duty Act* (36 Geo. 3 (1796), c. 52). *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60). *Mortgage Debenture Acts* (28 & 29 Vict. (1865), c. 78; 33 & 34 Vict. (1870), c. 20). *Married Women's Property Acts* (33 & 34 Vict. (1870), c. 93; 45 & 46 Vict. (1882), c. 75; 56 & 57 Vict. (1893), c. 63). *Metropolitan Board of Works (Loans) Act* (32 & 33 Vict. (1869), c. 102, s. 40), and *Metropolitan Board of Works (Money) Act* (51 & 52 Vict. (1888), c. 40). *Municipal Corporations Act* (45 & 46 Vict. (1882), c. 50). *National Debt Acts*, 1870 *and* 1884 (33 &

Secondly and thirdly, *as to the Relief administered and the Procedure adopted in Equity.*—Procedure is a matter which will be specially treated of, in a later chapter (*e*); and for the present, it will be sufficient, as exemplifying the nature of the relief in equity and the procedure in equity, to notice, with some particularity, the four following subjects of the equitable jurisdiction, namely, 1st, the execution of trusts; 2ndly, the specific performance of contracts; 3rdly, injunctions; and 4thly, the perpetuation of testimony.

1. The means for the protection and enforcement of trusts, are, in general, either by action, or by petition; but the relief on summons (originating or ordinary) is also now extensively available. The relief given may be, to compel the trustees to account for trust money received or which, but for their wilful neglect or default, they might have received; or to compel a sale of the trust property, and a due application of the proceeds of sale under the

34 Vict. c. 71, and 47 & 48 Vict. c. 23); and *Redemption and Conversion Acts* (51 & 52 Vict. (1888), cc. 2, 15; and 52 & 53 Vict. (1889), cc. 4, 6). *Parliamentary Deposits Act* (9 & 10 Vict. (1846), c. 20). *Petitions of Right Act* (23 & 24 Vict. (1860), c. 34). *Partition Acts* (31 & 32 Vict. (1868), c. 40; 39 & 40 Vict. (1876), c. 17). *Patents, Designs, and Trade Marks Acts*, 1883 to 1888 (46 & 47 Vict. c. 57; 48 & 49 Vict. c. 63; 49 & 50 Vict. c. 37; and 51 & 52 Vict. c. 50). *Settled Estates Act* (40 & 41 Vict. (1877), c. 18). *Settled Land Acts* (45 & 46 Vict. (1882), c. 38; 47 & 48 Vict. (1884), c. 18; 53 & 54 Vict. (1890), c. 69). *Land Tax Redemption Acts* (42 Geo. 3 (1802), c. 116; 16 & 17 Vict. (1853), c. 117). *Trade Marks Registration Acts* (38 & 39 Vict. (1875), c. 91; 39 & 40 Vict. (1876), c. 33; 40 & 41 Vict. (1877), c. 37; repealed by 46 & 47 Vict. (1883), c. 57). *Trustee Acts*, 1850 and 1852 (13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55); *Trustee Act*, 1888 (51 & 52 Vict. c. 59); and *Trustee Acts*, 1893 and 1894 (56 & 57 Vict. c. 53; 57 & 58 Vict. c. 10), repealing, but (in effect) re-enacting the *Confirmation of Sales Act* (25 & 26 Vict. (1862), c. 108); and the *Trustee Relief Acts* (10 & 11 Vict. (1847), c. 96; and 12 & 13 Vict. (1849), c. 74). *Law of Property Amendment Acts*, 1859 and 1860 (22 & 23 Vict. c. 35; 23 & 24 Vict. c. 38); and *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78).

(*e*) *Post*, bk. v. ch. xv.

direction of the court; or to set aside some disposition of the trust property made in breach of trust, and with a guilty knowledge on the part of the purchaser as well as of the trustee. And we ought more particularly to mention proceedings for the *administration of assets*, involving the payment of debts and legacies, and the distribution of residues, out of the estates, whether legal or equitable, of deceased persons, including the due *marshalling* of the assets so as to ensure, as far as may be, the payment of all the beneficiaries in full, and the passing of the accounts of such estates; which proceedings may be instituted either by a creditor, legatee, or next of kin, or even by the personal representative himself, when disinclined to undertake the sole responsibility of administering the assets (*f*). These proceedings belong wholly to the province of equity; for in a legal action effect can only be given to the claim of a particular creditor, without ever undertaking a general distribution of the assets (*g*). But it now forms one of the provisions of the Judicature Acts, that, in the administration of the assets of any person who may die after those statutes came into operation, and whose estate may prove to be insufficient for the payment in full of all his debts and liabilities, and in the winding up of any company under the Companies Acts, whose assets may prove insufficient for the payment of the company's debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the *law of bankruptcy*, with respect to the estates of persons adjudged bankrupt (*h*).

(*f*) Order LV. (1883).

(*g*) 2 Wms. Saund., 6th edit., 137 (*c*).

(*h*) Judicature Act, 1875, s. 10.

2. The Chancery Division exercises also the jurisdiction of *decreeing the specific performance of agreements*, instead of giving redress by way of damages for their non-performance. This mode of relief, indeed, is confined, generally speaking, to contracts regarding lands; it not being the ordinary practice in equity to enforce the specific performance of agreements relating to personalty, for the breach of these latter may in general be adequately redressed by an award of damages. But where damages are not an adequate remedy, a court of equity will enforce the specific performance of agreements relating to personal property. Thus, it will enforce an agreement for the sale of a chattel, where the chattel is of peculiar value to the purchaser, and cannot be obtained elsewhere (*i*); and it will enforce an agreement for the sale of stock or shares in a railway or other company, for the amount of such stock or shares is necessarily limited (*k*).

It is sometimes said, that on a contract for the sale of land the vendor is in equity considered to have become a trustee of the land for the purchaser from the signing of the contract; and the purchaser to have become as from the same date a trustee for the vendor of the purchase-money. This expression is misleading (*l*). While it is true that, as from the signing of the contract, the property sold is at the purchaser's risk (*m*), and that, as from that date, the vendor is bound to exercise reasonable care that it shall not be deteriorated (*n*), on the other hand the vendor is entitled to the rents and profits of the property until the time fixed for completion, is liable until that time to bear expenses and outgoings in respect of the

(*i*) *Fothergill* v. *Rowland* (1873), L. R. 17 Eq. 132.

(*k*) *Duncuft* v. *Albrecht* (1841), 12 Sim. 189.

(*l*) See *Wall* v. *Bright* (1820), 1 J. & W. 494; *Shaw* v. *Foster* (1872), L. R. 5 H. L. 321; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499; *Rayner* v. *Preston* (1881), 18 Ch. D. 1.

(*m*) *Vesey* v. *Elwood* (1842), 3 Dr. & War. 74.

(*n*) *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456.

property, and is not entitled until that time to interest on the purchase-money agreed to be paid (*o*).

3. With reference to *injunctions*, it is to be observed, that, prior to the Judicature Acts, relief of this equitable nature was almost exclusively to be sought in the Court of Chancery; and in all those cases in which the Court of Chancery could *alone* have originally granted this relief, the action for an injunction should still be brought in the Chancery Division (*p*), although, now, any division of the court may, in a proper case, grant this relief, it forming one of the provisions of the Judicature Act, 1873, section 25, that an injunction may be granted by an *interlocutory* order of the court, in all cases in which it shall appear to the court to be just or convenient that such order should be made (*q*). The Act only applies in terms to interlocutory orders, but it is settled that any relief which may be given upon an interlocutory application may be given *à fortiori* at the hearing. As to the nature of the application itself, it usually seeks to restrain, either till the hearing of the action or permanently, acts in violation of the applicant's rights or alleged rights, *e.g.*, the infringement of a patent or copyright, the commission of waste or nuisance, an obstruction to ancient lights, an interference with the flow of water, the breach of a covenant running with land in equity, the breach of a negative stipulation in an executed contract. In cases of an urgent nature, the injunction may (if the case be supported by a proper affidavit,) be obtained *ex parte*, that is to say, without any previous notice to the opposite side.

The injunction is usually *prohibitory*, but, in exceptional cases, it is *mandatory*, *i.e.*, directly securing the performance of some act, or the restoration of the original

(*o*) *Birch* v. *Joy* (1852), 3 H. L. C. 565, p. 591; *Carrodus* v. *Sharp* (1855), 20 Beav. 56.

(*p*) *Flower* v. *Local Board of Low Leyton* (1877), 5 Ch. D. 347.

(*q*) *Beddow* v. *Beddow* (1878), 9 Ch. D. 89.

status quo (*r*). And a mandatory injunction may be granted on interlocutory application (*s*).

A Court of Equity could not, under its original constitution, give damages either for a breach of contract or for a tort ; but the Chancery Amendment Act, 1858 (*t*)—commonly known as Lord Cairns' Act—enabled the Court of Chancery to award damages, either in addition to, or in substitution for, an injunction or specific performance. And, since the Judicature Act, each division of the High Court has a complete common-law as well as equitable jurisdiction.

An injunction also used sometimes to restrain a person from prosecuting his legal action, or from enforcing a judgment he had obtained therein ; but, with regard to the Supreme Court, the Judicature Acts have now provided, that no cause or proceeding pending in the High Court of Justice, or before the Court of Appeal, shall be restrained either by prohibition or injunction. But every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if the Act had not passed, either unconditionally or on any terms and conditions, may now be relied on by way of *defence* to the action ; and these courts may also now direct a stay of proceedings, in any cause or matter pending before them (*u*). But an injunction may, in a proper case, still issue to restrain the *institution* of legal proceedings in the High Court (*x*), or indeed in any court, domestic or foreign.

4. *As to the perpetuation of testimony.*—The examination of witnesses never used to take place in a legal action, except with reference to matters in respect of which some proceeding had been already commenced ;

(*r*) *Isenberg* v. *East India House Co.* (1863), 3 De G. J. & S. 263.

(*s*) *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774.

(*t*) 21 & 22 Vict. c. 27.

(*u*) Judicature Act, 1873, s. 24, sub-s. (5).

(*x*) *Cercle Restaurant* v. *Lavery* (1881), 18 Ch. D. 555.

and the law is so still. But it is sometimes very material for the protection of existing rights, that the evidence relating to them should be taken and preserved, *though they may not yet be the subject of any legal proceedings;* the position of the parties interested being such as not yet to afford any opportunity for litigation, though there may be reasons for expecting a future contest of the right, and that at a period when the witnesses, now competent to give material evidence upon it, may have been removed by death (*y*). In such cases, therefore, the Court of Chancery lent its aid, by permitting any of the parties interested to institute proceedings against the rest, *with a view to the mere perpetuation of the testimony*, and without reference to any other present relief; and this was effected by taking down the examinations or depositions of the witnesses, which, in the event of the right being tried at any future period, when the attendance of the witnesses could no longer be procured, was receivable in evidence between the same parties or those claiming under them. With a view to extending the application of so convenient and important a remedy, it was enacted, by the Perpetuation of Testimony Act, 1842, that any person who, upon the happening of any future event, would (under the circumstances alleged by him to exist) become entitled to any honour, title, dignity, or office, or to any estate or interest in property real or personal, the right or claim to which could not by him be brought to trial before the happening of such event, might take proceedings in equity, to perpetuate any testimony material for establishing such claim or right; and this provision has been reproduced in substance in the Rules of the Supreme Court (*z*).

There is, moreover, one fundamental distinction between law and equity, which has not always been sufficiently adverted to. The law, whether in actions for breach of

(*y*) *Earl Spencer* v. *Peek* (1867), L. R. 3 Eq. 415.

(*z*) Ord. XXXVII., rr. 35–38; *Marquis of Bute* v. *James* (1886), 33 Ch. D. 157.

contract or in actions of tort, is guided, in fixing the damages, by the loss sustained by the plaintiff. On the other hand, where a court of equity grants an account, the account is invariably an account of moneys which have been received by the person against whom the account is directed, or which, but for his wilful default, would have been received by him, or of profits which he has made or which, under the doctrine of the court, he is estopped from denying that he has made. That is to say, the primary object of a court of equity is not, to restore property to the plaintiff which has been wrongfully taken from him, or to compensate him in damages for its loss; but to deprive the defendant of property which it is against conscience for him to retain.

The property which is so taken from the defendant necessarily goes to the plaintiff; but the relief given to him is incidental. And he may, under the operation of the equitable doctrine, obtain an advantage which would not have accrued to him, if the only object of the court had been to repair the wrong in respect of which he seeks redress (*a*).

In a previous chapter the provisions of the Judicature Acts have been set out, and the mechanism explained, by which the Court of Chancery ceased to have a separate existence, and was incorporated, with a number of other courts, into a new tribunal. But the effect of those enactments, and of the so-called "fusion of law and equity" which they brought about, has not been to diminish in any respect the necessity for discriminating between legal and equitable claims, and between legal and equitable defences. The object of the Judicature Acts was, to diminish the quantity of legal proceedings, and to ensure that, where A. had a claim against B., A.'s claim, and any counterclaim of B. which was naturally connected with A.'s claim, might be disposed of, exhaustively and con-

(*a*) See this point illustrated in Ashburner, *Equity*, pp. 51—54.

clusively, in one single proceeding. The object of the Acts was not, except as regards certain specified particulars which have already been dealt with (*b*), to alter the principles on which the courts of law and equity had respectively proceeded before the fusion took place (*c*). It follows that a legal claim can only be met—after the Acts as well as before—by a legal defence, or by some equity which, before the Acts, would have authorized the issue of an injunction to restrain proceedings at law on the claim. While, on the other hand, an equitable claim may be met by equitable defences, an equitable claimant may be put upon equitable terms; and an equitable title cannot be enforced against a legal title which it has no ground in conscience to remove (*d*).

(*b*) *Ante*, pp. 455, 456.

(*c*) An alteration in procedure may incidentally bring about an alteration which looks, at first sight, like an alteration of principle. Thus, discovery may now be obtained against a purchaser for value without notice. See Ashburner, *Equity*, p. 70.

(*d*) See *ibid.* pp. 22—24.

CHAPTER IX.

OF THE GENERAL PRINCIPLES OF EQUITY.

Jurisdiction of Equity.—Formerly it was customary to divide the matters which came within the jurisdiction of the Court of Chancery into those which came within its exclusive jurisdiction, those which came within its concurrent jurisdiction, and those which came within its auxiliary jurisdiction.

In the first of these divisions were included all matters which might sustain a suit in equity, but which did not give rise to a cause of action in any other court. Of these the most typical and important were matters connected with the administration of trusts which, as we shall shortly see, were entirely the creation of the Court of Chancery itself. In the second division were placed matters in which relief could be obtained in some other court besides a court of equity. Thus, questions arising out of fraud, mistake, or partnership, came equally within the equity and the common law jurisdiction ; and matters connected with deceased persons' estates equally within the jurisdiction of equity and of the ecclesiastical courts. Gradually this branch of the jurisdiction of equity was held to include all matters in which the Court of Chancery could give a more complete or effectual remedy than a court of law. As to matters coming within this branch, the Court of Chancery decided for itself the validity of the legal right involved (*a*). In the third division were placed matters in which the Court of Chancery gave its aid to secure the proper trial in another court of some

(*a*) See Ashburner, *Equity*, p. 3.

other matter over which itself claimed no jurisdiction. Thus, the court would help the trial of a question of contract or tort in a court of common law, by ordering discovery of documents. Bills to preserve testimony, and interim injunctions till the trial of actions at law, were also common examples of these matters.

This division of matters within the jurisdiction of equity was convenient, and even necessary, while equity and common law were administered in completely different courts. As we have seen, however, the Judicature Acts have now fused the administration of law and equity. Each division of the High Court has, in theory at least, jurisdiction over all matters, whether legal or equitable, brought before it. This has made the old division of the matters within the jurisdiction of equity of little use and less logic; since the Courts of Chancery have now in all matters a jurisdiction concurrent with the courts of law.

Equitable and Statutory Amendments of the Law.—It seems then no longer desirable to frame an exposition of the matters subject to the rules of equity upon this old system of division. In the present work, it is especially undesirable, since equitable remedies and equitable procedure form the subject-matter of other chapters. We are here dealing with the substantive part of equity only. That part consists entirely of amendments of the common law of the country; and in this respect has had, in the result, much the same effect as a series of statutes. But it differs from a series of statutes in two respects. In the first place, when a statute is passed amending the common law, it puts an end to the common law as far as it amends it, and substitutes the law enacted by the statute in its place (*b*). Equity, on the other hand, attained the same result, not by putting an end to the common law, but by preventing its operation, and, instead of substituting,

(*b*) *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107; *New Windsor Corporation* v. *Taylor*, [1899] A. C. 41.

superadded its amendments to it. In the second place, the amendments made by statute have proceeded on no very definite principles. No doubt the history of legislation in England shows various trends in law reform, more or less marked, and more or less consistently followed. But, in the end, alterations of the law by statute are decided simply by the opinion of the legislature, which changes with the varying interests and views of those who control it. Much the same might have been, and, indeed, was said at one time (*c*), of the amendments made by equity; but before long the decisions of the different chancellors were consistent enough to disclose that they proceeded on certain general principles. Those principles were gradually refined, and, even until very recently, from time to time greatly extended in their operation; but in essentials they have remained, since Lord Hardwicke's time at least, practically unaltered, save where the legislature has changed them, as it has changed the common law.

These two differences make it possible to arrange the alterations made by equity in the substantive law of England, in a more systematic way than the alterations made by statute can be arranged. The only arrangement of statutory reforms that the ingenuity of text-book writers has so far discovered, is the primitive if convenient one called the alphabetical. The alterations made by equity can, however, be arranged according to the general principles which gave them birth, and have since controlled their growth. A clear conception of these will give the student a systematic view of the subject, and enable him to understand some subordinate doctrines and positions of equity, which might otherwise appear to him somewhat peculiar.

The first General Principle of Equity.—The first, then, of these general principles or maxims of equity, as they

(*c*) Selden, *Table Talk*, tit. *Equity*.

are called, which we will consider, is this: *Equity acts in personam.* By this is meant that courts of equity, in questions as to property, with which they were and are chiefly concerned, never, originally at any rate, interfered with the property itself, but merely with the legal owner—that is, the owner by the common law. However little rightful claim the legal owner, in their opinion, had to the property, they never attempted to take it from him by their decree. What they did do was, to order him to hold it for the benefit of, or to transfer it to, the rightful owner. If he refused to obey this order, all that the courts could do originally was, to attach him personally for contempt of their orders, and imprison him until he purged his contempt, or, in other words, did what he had been ordered to do. In early times, the courts found that occasionally this remedy was insufficient: stubborn persons would now and then refuse to obey their orders, and defy the courts to do their worst. So the courts found it necessary to resort to other means of coercion. First they tried fines. Then, by writ of assistance, they put the person rightfully entitled to the property in dispute (or *in suit*, as it was called) in possession, and preserved him there, without, however, affecting to transfer the legal title. And later, by a writ of sequestration, they directed the property in dispute, and afterwards all the property of the person in contempt, to be seized and retained till he purged his contempt (*d*). Now, under Order XLVII., R. S. C., the judgment of a court of equity can be enforced, like that of a judgment of a court of law, by writ of possession; and, under Part III. of the Trustee Act, 1893, the courts may, in proper cases, make orders vesting the legal title to the property in those rightfully entitled to it, or appoint a person to convey it to them. But still the foundation of the whole system of equity was and is, that a court of equity acts *in personam.*

(*d*) See Ashburner, *Equity* (pp. 38—45), for a very interesting and learned account of the development of the process of equity.

Equitable Estates.—By the application of this principle, courts of equity were enabled to create a new system of ownership and interests in property, unknown to the common law, and altogether beyond its jurisdiction. If a man were in possession of property under circumstances which conferred upon him the ownership of it at common law, the common-law courts had no option but to treat him as entitled to all the rights of user and disposition which common-law ownership conferred. Courts of equity also recognised his common law ownership ; but as to the rights of user and disposition, if he obtained or retained the common-law ownership under circumstances which in their view conferred these rights on another person, they ordered and compelled him to permit this other person to enjoy them. When this occurred, clearly the common-law ownership became a mere husk, all the fruit of real ownership going to the person for whose benefit the courts of equity directed the common-law owner to hold. Still, at first, there was doubt as to the nature of that person's right—whether it was merely a personal right against the legal owner, or an estate or interest in the thing owned. Ultimately it was held to be an estate or interest in the thing owned ; but we shall shortly see that to this day it has still some of the characteristics of a personal right against the legal owner.

Equity follows the Law.—As soon as the right of the person entitled in equity was recognised as an estate or interest in the thing owned, the courts began to apply another principle—that, as regards equitable estates, *equity follows the law.* By this was meant that, in general, equity would treat the equitable estate or interest in a thing, as having the same incidents as the legal estate or interest. Thus, the equitable estate in land might be either a fee simple, a fee tail, a life estate or a leasehold ; and each estate, on the death of its owner intestate, devolved precisely as the legal estate would have devolved. So much so, that if there were any special

custom of descent annexed to the land—such as affects lands held in gavelkind (*e*) or borough-english—it affected the equitable as much as the legal estate. And an equitable fee tail could be barred only by the same ceremonies as the legal fee tail. In the same way, an equitable fee simple, like a legal fee simple, might (only, until the Act for the Abolition of Military Tenures, 1662, in a much freer way) be devised by the will of its owner, or limited out in estates in succession, or alienated *inter vivos*, or mortgaged. Not content with this, equity—but comparatively recently (A.D. 1848)—permitted the creation of equitable easements which may run with the equitable estate in the land, just as legal easements may run with the legal estate (*f*); and which affect the owner of the legal estate, just as equitable estates affect him (*g*) (*infra*, p. 479).

In the same way, equitable interests in chattels real and personal, devolved at the death of their owner, on his executors or administrators, just as legal interests do, and generally evinced the characteristics of legal interests.

Where Equity did not follow the Law.—But though, in general, in declaring the incidents of equitable estates and interests, courts of equity followed the law, yet they were under no compulsion to do so. Equitable estates and interests were their own creatures, and they could impress upon them what characteristics they chose; and when they saw good reason for so doing, they did not follow the law. Indeed, it is hardly too much to say, that the original motive for the creation of equitable estates, in freehold lands at any rate, was in order to free them from the fetters which the law, as it then stood, had imposed upon them.

(*e*) Though the peculiar descent of land held in gavelkind may be treated as a custom, it must be remembered that gavelkind is not a custom, but is the common law of Kent. See *Re Chenoweth*, *Ward* v. *Dudley*, [1902] 2 Ch. 488.

(*f*) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562: *per* JESSEL, M.R., at p. 583.

(*g*) *Tulk* v. *Moxhay* (1848), 2 Ph. 774.

The most important points upon which equity, in declaring the incidents of equitable estates and interests, did not follow the law, were as regards (1) incidents arising out of seisin ; (2) interests in chattels personal, and (3) the disabilities of married women.

(1) Incidents arising out of Seisin.—It is commonly said, that the reason equity did not attach these incidents to equitable estates in freeholds was, because the seisin of the land was not in the equitable owner, but in the legal owner. It would be perhaps more accurate to say, that this was the reason why equity was able to prevent such incidents attaching. As has been pointed out, equitable estates owe their birth largely to the desire to escape from such incidents; and there is no doubt, that if the courts of equity had considered these incidents desirable, they would have attached them to equitable estates, seisin or no seisin.

Alienation by feoffment was one of these incidents. A legal freehold in possession could not be transferred *inter vivos*, except by means of a feoffment with livery of seisin (*h*). Every equitable estate in freehold, save a fee tail, could originally be transferred without any ceremony, and even without writing (*i*). The Statute of Frauds, 1677, made writing necessary (s. 9) ; but a deed is still unnecessary, though always used in practice. An equitable fee tail can be alienated only by an enrolled deed, just like a legal fee tail (Fines and Recoveries Act, 1833, s. 47).

Another incident arising out of the doctrine of seisin was the liability of contingent remainders to fail, if the preceding estate of freehold determined before they were ready to vest in possession. This incident equity again refused to adopt. If the estate preceding a contingent equitable remainder failed before the latter was ready to vest, the remainder did not fail, but simply continued ownerless till it vested under the settlement. Originally

(*h*) See Strahan, *Intro. to Conveyancing*, p. 5.

(*i*) *Ibid.*, p. 33.

no time was fixed before which it must vest, but at last Lord Nottingham invented the rule against perpetuities (*k*) (*supra*, vol. i., pp. 334, 335). If the contingent remainder was so limited that it might possibly not vest within a life or lives in being and twenty-one years after, as that rule required, it did not fail, but was void *ab initio*.

A third point arising out of seisin, on which equity did not follow the law, was as regards escheat (*l*). On the death of a legal tenant in fee, intestate and without heirs, his lands escheated, or reverted to the lord from whom they were held, who is now assumed to be the king until it is shown that the tenant held from a mesne lord. On the other hand, on the death of the owner of the equitable estate, intestate and without heirs, there was no escheat; but the equitable estate became merged in that of the owner of the legal estate—who was called the *terre tenant*—who henceforth held the land for his own benefit (*m*). By section 4 of the Intestates Estate Act, 1884, however, it is now enacted, that the law of escheat will apply to equitable estates and interests, in the same manner as if the estate or interest were a legal estate in corporeal hereditaments. This enactment probably means, that the law of escheat will apply, as if the equitable estate were the legal fee simple in the hereditaments in question (*n*).

It is true that, although the Court of Chancery finally laid it down, in *Burgess* v. *Wheate* (*o*), that there would be no escheat of an equitable interest, the equitable owner long remained subject, though not without some difference of opinion (*p*), to the danger of losing his rights by

(*k*) Strahan, *Intro. to Conveyancing*, p. 141; and see *Borland's Trustee* v. *Steel Brothers, Limited*, [1901] 1 Ch. 279.

(*l*) Strahan, *Law of Property*, p. 295.

(*m*) *Burgess* v. *Wheate* (1759), 1 Eden, 177.

(*n*) See *Re Wood, Att-Gen.* v. *Anderson*, [1896] 2 Ch. 596.

(*o*) (1759), 1 Eden, 177.

(*p*) *Eales* v. *England* (1702), Pre. Ch., at p. 202; *Pawlett* v. *Att.-Gen.* (1667), Hardres, 465; *Att.-Gen.* v. *Duke of Leeds* (1833), 2 My. & K. 343.

escheat of the legal estate of his trustee. For, in such an event, the lord who took by escheat, as he did not claim *under* the trustee, but by a superior title, was not bound by the trust. But this liability was removed by the Trustee Act, 1850 (ss. 15, 19, 46).

(2) Interests in Chattels Personal.—At common law, chattels personal could only be the subjects of absolute ownership. The absolute ownership might, it is true, be divided up between two persons. One might be entitled to the possession of the chattel, and the other to all the remaining rights of ownership in it. That is the state of things which arises on a bailment of goods. But the ownership could not be divided up in *successive* portions. A horse, for instance, could not be given to A. till the end of the year and then over to B. ; nor could a valuable security be limited out to A. for life, and on his death among his children equally. A gift of a chattel personal for life gave the donee the whole property in it.

This rule equity altogether disregarded. It permitted successive interests to be created in the equitable estate in goods, at least as freely as the common law allowed successive estates to be created in the legal estate in land. It is true it followed the law to this extent. As long as the equitable estate in goods was personalty, it would not permit it to be divided up into interests which at law could subsist only in realty. Thus, the equitable estate in chattels, while such estate was personalty, could not be limited out into heritable interests—that is, interests which would, on the death of the owner, descend to the heir. If the equitable estate were limited to A. for life, and on A.'s death to A.'s eldest son and the heirs of his body, then, on A.'s death, his eldest son took, not an estate to him and the heirs of his body, but the absolute interest in the equitable estate in the goods (*q*). This rule, however, only applied so long as the equitable estate in the chattels was personalty.

(*q*) See Underhill and Strahan, *Inter. of Wills*, p. 160.

But the equitable estate in chattels might be realty. Thus, if securities were transferred to a trustee with directions to sell them and invest the proceeds in the sale of land, though no sale or investment ever took place, the equitable estate in the securities would be realty. The securities would be, in the technical phrase, *converted* into realty, so far as the equitable estate in them is concerned, from the moment they were transferred to the trustee. This equitable estate then could be limited out into estates for life, in fee tail, and in fee simple ; and, on the death of the owner of a heritable estate, it would devolve on his heir of the body or heir-at-law, just as if the equitable estate was the legal estate in freehold land. In the same way, a direction to a trustee to sell freehold land, and invest the proceeds in securities, will immediately change the equitable estate in the land into personalty, which can be limited out only into life interests and absolute interests, like the equitable estate in unconverted personalty, and which will on death devolve as personalty. And conversion may be brought about without any direction. On making a contract for the sale of freehold lands the vendee becomes in equity the owner of the lands and the vendor is entitled merely to a lien upon them for the purchase money (*r*). In equity then, the vendor's interest in the lands of which he is till the conveyance legal owner is regarded as personalty, and the vendee, who in law has only a right to damages if the vendor refuses to carry out the contract, is regarded as the owner of the lands. On the death of either, his equitable interest will descend according to its nature in equity (*s*).

This doctrine of conversion is based on the equitable maxim that *equity regards that as done which ought to have been done.* If a trustee fails to sell securities and

(*r*) See Ashburner, *Equity*, p. 344, and *post*, pp. 531 and 533.

(*s*) *Bubb's Case* (1678), Freem. C. 41. And see *Re Thomas* (1886), 34 Ch. D. 166.

invest the proceeds in land, or to sell land and invest the proceeds in securities when he has been properly directed so to do, the court will not allow his negligence or misconduct to prejudice those entitled to the equitable estate. Accordingly, it fixes the rights of these precisely as if the trustee had done as he should have done. Where, however, the direction to convert is contained in a will, questions arise as to how far the direction goes ; and it has now been settled that the direction is to be considered to be only for the purposes of the will. Accordingly, in so far as those purposes fail there is no conversion. Thus, if land be directed to be sold and the proceeds divided equally between A. and B., then, if both A. and B., or if either of them, die before the testator, there will be a total or partial failure (as the case may be) of the trust in favour of A. and B. In so far as it has failed there will be no conversion ; and the land will go to the residuary devisee or heir-at-law (*t*). But there is this distinction between a total and a partial failure of a trust to convert. If the trust fails altogether, the property goes to the heir-at-law or next-of-kin, as the case may be, *unconverted*—that is, land directed to be sold will go as land, and money directed to be invested in land will go as money. If, on the other hand, the trust fails only partially, then the property goes to the heir-at-law or next-of-kin, as the case may be, *converted*—that is, land directed to be sold will go as money, and money directed to be invested in land will go as land. For example, in the case before given, if both A. and B. die before the testator, the heir-at-law will take the equitable estate in the land *as land ;* and on his death it will descend to his heir. But if one only of them die, then the heir-at-law will take the equitable estate in half of the land or proceeds of the land *as money ;* and on his death it will go to his next-of-kin (*u*).

(*t*) *Ackroyd* v. *Smithson* (1780), 1 Bro. C. C. 503.

(*u*) Ashburner, *Equity*, p. 348.

(3) Disabilities of married women.—As has already been explained (see vol. ii. pp. 309—311), at common law married women were incapable of holding personalty, or disposing of property (*x*). This disability was altogether disregarded in equity. The equitable estate in land or goods could be effectively vested in a married woman, and she could freely dispose of it *inter viros* and by will. Her rights in equity have been sufficiently stated in the chapter dealing with Husband and Wife (*y*); and it is necessary here only to refer to this as another point upon which equity did not follow the law, but impressed on the equitable estate characteristics which it regarded as more consonant with justice.

Equity acts on the conscience.—The second general principle of equity which we will consider is this: *Equity acts on the conscience.* In other words, a court of equity was originally a court of conscience. Where a person obtained or retained property under circumstances which made it contrary to conscience that he should himself enjoy it, the court compelled him to hold for the benefit of the person or persons rightfully entitled. And anyone applying to the court for its assistance to obtain what rightfully belongs to him, must begin himself by doing what is right. That position is summed up in the maxim, *Who seeks equity must do equity.*

Doctrine of notice.—Now there is this difference between matters of conscience and matters of law. Law in general binds persons, quite irrespective of their knowledge of it or not. This is sometimes put in this way—that *everyone is presumed to know the law*—a somewhat hypocritical fiction invented for the purpose of identifying law and morals. However, this much is certain; whether a person

(*x*) Strahan, *Law of Property*, p. 360.

(*y*) *Ante*, bk. III., ch. II.

knows or does not know the law, it binds him. If I buy land to which the vendor has a title bad in law, that title will not be improved because I thought it was good. But in matters of conscience knowledge makes the whole difference between right and wrong. If I buy land to which the vendor has a title good at law, not knowing that the vendor is bound in conscience to hold it for the benefit of some one else, I do nothing against fair dealing ; if I do know this I make myself party to the vendor's fraud.

Courts of equity, then, being courts of conscience, this principle, as might be expected, bulks largely in their jurisprudence. It is the *fons et origo* of what is known technically as the *doctrine of notice*. That doctrine may be summed up in three short propositions. The first is this : *When a person has obtained for value a title good at law to any property, his legal rights as owner will not be affected by any equitable rights binding on the previous owner, unless at the time of purchase he had notice of such rights.* The second is this : *A person has notice of equitable rights when he actually knows of, or has reasonable grounds to suspect, or might if he had made the enquiries usual in such transactions have discovered, the existence of those rights.* The last proposition is based on the practical consideration that in such transactions the investigation of title is, as a rule, not made by the purchaser or mortgagee, but by his skilled agent. It may be thus stated : *Notice acquired by the agent in carrying through the transaction is notice to the principal* (*z*). We will consider shortly each of these propositions.

1. The first point to be noted in the first proposition is, that the person obtaining the legal title must have given value for it. A title bad in equity cannot be improved by the transfer of the legal title to a volunteer. The principle is, that it is only *where equities are equal that the legal*

(*z*) Conveyancing Act, 1882, s. 3 (1) (ii).

title shall prevail; and, as between the person entitled to equitable rights in a thing, and the person who takes the legal title to it as a gift, the equities are not equal. In the second place, the title he obtains must be good in law. By this is meant, that he must have obtained the legal title of the vendor, not that the title must be good in law absolutely. A possessory title is good in law as against equitable rights affecting its previous holder (*a*). Lastly, the person taking the legal title must not have the notice before or at the time he gives the value (*b*). That is usually the time when the legal title is conveyed to him, but it need not be so. Not unfrequently mortgagees lend money on equitable mortgage without notice that other equitable mortgages already exist. Here if, after the money is advanced, they having learnt in the meantime of the preceding equitable mortgages, obtain a conveyance of the legal estate from the person having it, or even a declaration of trust of it, in their favour, this will entitle them to rank in priority to those other equitable mortgagees, whose mortgages preceded theirs in point of time (*c*). This rule applies in every case, save where the holder of the legal estate holds it under circumstances which would make his transfer of it to the puisne (or later) mortgagee, a breach of trust (*d*).

It should be added, that notice only affects the person receiving it. If the latter afterwards transfers his legal title for value to another person who has no notice of the prior equitable rights, such person is not affected by them. Nor even is the first person, if he subsequently *bonâ fide* takes a re-transfer for value from the person who gave value without notice unless, in the words of JESSEL, M.R., he is a "trustee buying back trust property which he has

(*a*) *Jones* v. *Powles* (1834), 3 My. & K. 581.

(*b*) *Tourville* v. *Naish* (1734), 3 P. Wms. 306; cf. *Jared* v. *Clements*, [1903] 1 Ch. 428.

(*c*) *Brace* v. *Duchess of Marlborough* (1728), 2 P. Wms. 491.

(*d*) *Taylor* v. *Russell*, [1892] A. C. 244, at p. 259.

" sold, or a fraudulent man who has acquired property by " fraud " (*e*).

2. Notice is of two kinds. The first is called *actual notice;* that is, where the person taking the legal title had positive knowledge of the existence of the equitable rights (*f*). The second is called *constructive notice;* that is, where the person taking the legal title has knowledge of facts which reasonably suggest the probable existence of the equitable rights, or where, if he had made proper enquiries, he would have discovered their existence (*f*). Of actual notice nothing need here be said. Of constructive notice a few examples may be given. Thus, knowledge that a trust deed exists affects the taker of the legal estate with notice of all terms of the deed (*g*). Knowledge that the title deeds of the person giving the legal title are in the possession of a stranger, affects the person taking the legal title with constructive notice of such stranger's rights (*h*). Knowledge that land is in possession of a tenant, gives constructive notice of the tenant's rights (*i*); and knowledge that such tenant pays his rent to a stranger who is not a mere rent or estate agent, gives constructive notice of such stranger's rights (*i*). But, on the other hand, knowledge that the title deeds are not in the possession of the person giving the legal title is not (if they are in fact in the hands of a stranger) constructive notice of this, or of such stranger's rights, if the person taking the legal title made enquiries about them, and received a reasonable explanation of their absence.

3. The law as to notice to an agent being notice to his principal is now stated in section 3 of the Conveyancing Act, 1882. That section enacts, that a purchaser shall not be

(*e*) *Re Stapleford Colliery Company, Barrow's Case* (1880), 14 Ch. D. 432, at p. 445.

(*f*) Conveyancing Act, 1882, s. 3.

(*g*) *Cothay* v. *Sydenham* (1788), 2 Bro. C. C. 391; *Knight* v. *Bowyer* (1858), De G. & J. 421.

(*h*) *Dryden* v. *Frost* (1838), 3 My. & Cr. 670.

(*i*) *Hunt* v. *Luck*, [1902] 1 Ch. 428.

prejudiced by notice of any instrument, fact, or thing, unless in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel *as such*, or of his solicitor or other agent *as such*, or would have come to the knowledge of his solicitor or other agent as such, if such enquiries and inspections had been made as ought reasonably to have been made by the solicitor or agent (*k*).

Equitable Priorities.—Where the equities are equal, and one having an equal equity has also a legal title, the principle that *where equities are equal the law shall prevail* applies. Where, however, all have merely equitable interests, the rule is *qui prior est tempore, potior est jure.* This principle, however, like the preceding one, is not applicable, except where the equities are really equal. Where, through the fraud or gross negligence of a person having the equitable precedence, or even having the legal title, the original owner is enabled to perpetrate a fraud, the person who suffers from the fraud is entitled to have a charge on the property, in precedence of the person who had a prior charge or title, but by whose fraud or negligence the original owner was enabled to commit the fraud (*l*).

Arrangement of Subject-Matter.—The principles which control the amendments of the law effected by the courts of equity will, from what has been said, be seen to be primarily two. The first is, that *equity acts on the conscience*, and the second—which, strictly speaking, is only a corollary from the first principle—that, *he who seeks equity must do equity.* Assuming these as our basis for arranging the subject-matter of these chapters on equity, it would appear, that the first principle has two

(*k*) See *Taylor* v. *London and County Banking Company*, [1901] 2 Ch. 231; *Espin* v. *Pemberton* (1859), 3 De G. & J. 547.

(*l*) *Rice* v. *Rice* (1853), 2 Drew. 73.

applications. The first is where the conscience is affected on account of an express confidence reposed in it. That will form the subject-matter of our next chapter, and will be called *Equities arising from Actual Confidence.* The second is where the conscience is affected, not by any express confidence, but on general principles of fair dealing. That will form the subject-matter of the succeeding chapter, and will be called *Equities arising from Constructive Confidence.* The last part of our subject will turn on the principle just stated—that he who seeks equity must do equity ; and that we will call *Reciprocal Equities.*

CHAPTER X.

OF EQUITIES ARISING FROM ACTUAL CONFIDENCE.

Trusts.—Equities or equitable interests which arise out of actual confidence reposed in, or the actual undertaking of, the nominal owner of the property in which the equities subsist, are called *trusts*. That term is commonly extended also to every case where the nominal owner in law or equity of the property is not the beneficial owner. While it is difficult to suggest any term more suitable than "trust" for the relationship of, for instance, the vendor of property and the vendee, or even the mortgagee of property and the mortgagor, yet this poverty of nomenclature in English law is greatly to be deplored. The obligations of the parties to a trust arising out of an actual confidence or undertaking, are very different from those of the parties to a so-called trust which does not arise out of actual confidence or undertaking, but is purely the creation of rules of law (*a*). In what is now said it must be understood that trusts in the natural sense of that word, in the sense of equities arising out of actual confidence, are alone referred to.

We have used the phrase "nominal owner" and "beneficial owner," in referring to trusts in the sense in which we are now using that word. It seems that this phrase is much more accurate than those ordinarily employed—"legal owner and equitable owner." There is no reason in the

(*a*) For instance, see, as to vendor and purchaser, *Wall* v. *Bright* (1820), 1 J. & W. 494; *Cornwall* v. *Henson*, [1899] 2 Ch. 710; and as to mortgagee and mortgagor, *Kennedy* v. *De Trafford*, [1897] A. C. 180; *Nutt* v. *Easton*, [1900] 1 Ch. 29.

world why a trust should not be created by an equitable owner and, as far as trusts of land are concerned, the usual experience is that they are as often created out of the equitable as out of the legal estate. A large proportion of the land of England is subject to legal mortgages. The mortgagee is the legal owner of mortgaged land, and the mortgagor has only an equitable estate in it. Yet, most of this mortgaged land is held in settlement in trust for the family of the mortgagor. In such cases it is most misleading to describe the mortgagor's trustees as the legal owners, or as having the legal estate.

The subject of trusts naturally divides itself into two parts; firstly, the nature of trusts, and secondly, the administration of trusts. The former of these, as it contains most of the principles relating to trusts, is, for the student, the more important; though the latter dealing as it does with the practical application of the law, is probably at least as important to the practitioner. These volumes being intended primarily for students, we will deal at greater length with the former part.

Part I.—The Nature of Trusts.

Analysis of a trust.—Most attempts to define trusts have been of little service to the student (*b*). It seems more expedient not to attempt what so many others have failed to accomplish, and to content ourselves with

(*b*) Perhaps the most useful and correct definition of a trust so far given is that in Art. I. of Underhill on *Trusts and Trustees:* "A trust is an equitable obligation, either expressly undertaken or constructively imposed by the court, whereby the obligor (who is called a trustee) is bound to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trustent*) of whom he may or may not himself be one, and *any one of whom may enforce the obligation.* Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument or by law, is called a breach of trust." The words in italics are scarcely accurate in the case of discretionary trusts See *infra*, p. 486.

explaining the relationship between the parties thereto, which is constituted when a valid trust arising out of actual confidence or undertaking is established.

Now to the constitution of a trust three parties—not *persons*, it is to be noted—are necessary. The first is the party who is the beneficial owner (*c*) of the property about to be subjected to the trust—that is, the party who, in the words of section 7 of the Statute of Frauds, 1677, is by law enabled to declare the trust. This party provides the property to be "settled in trust," which, on settlement, is called the *trust property;* and he is therefore called the *settlor*. The next party is the party in whom the trust property is, by the act of the settlor, nominally vested. By nominally vested is meant, that where the settlor had not merely the beneficial, but also the legal, estate in the property, the settlor confers on him the legal title, and that where the settlor had only the equitable estate he confers on him the equitable title to the trust property; but in neither case does the title carry with it the right to the beneficial interest in the property. This beneficial interest—the right to enjoy the trust property—he has undertaken to hold for the benefit of some one else, and therefore he is called a *trustee* of it. The third party is the party for whose benefit the property is held; and he is therefore called the *cestui que trust*, or *beneficiary*. As a rule, the trust property is not merely held for the benefit of the *cestui que trust;* but he is also entitled in equity to it. This, however, is not the case always. In what are known as *discretionary trusts* the temporary *cestui que trust* has no claim in law or equity to the beneficial interest in the trust property. What benefit he shall receive depends absolutely on the trustee's honest judgment. This helps us to define the position of the trustee and *cestui que trust*. The trustee is the party who holds

(*c*) *Kronheim* v. *Johnson* (1877), 7 Ch. D. 60; *Tierney* v. *Wood* (1854), 19 Beav. 330.

the trust property, but who, *as trustee*, cannot derive any benefit from it. The *cestui que trust* is the party for whose benefit the trustee holds the trust property, but who may or may not (*d*) have a right in equity to compel the trustee to permit him to enjoy such benefit.

As has been pointed out in our explanation of the relationship between the parties to a trust, by "party" was not meant "person." Each party to a trust may consist of several persons, and one person may in himself constitute two, and even, to a certain extent, the three parties. Thus, a father and mother frequently join to appoint property in which both have joint or successive interests, in trust for their children. Here both father and mother are settlors—at least when between them they are beneficially entitled to the whole interest appointed; if they appoint under a mere special power to appoint among their children, then the creator or donor of the power, and not they, will be the settlor. Again, there is seldom only one trustee, at any rate in the case of express trusts, which, as we shall shortly see, are by far the largest class of trusts arising out of actual confidence. It is usual to appoint at least two or three persons joint trustees, and to vest the trust property in them as joint tenants. And, in the same way, it is rarely that a trust is constituted for the benefit of a single person. Most trusts are either for the benefit of all the members of a family, or for the benefit of the public generally, or of a particular section of it. And, on the other hand, the same person may be, and frequently is, both settlor and *cestui que trust*. When a man on his marriage settles his property, he usually reserves to himself a life interest in it, with an ultimate

(*d*) Thus, where money is vested in trustees to be used by them at their absolute discretion for the benefit of A. and his family, it seems impossible to say that the equitable estate is in any one; and, as long as the trustees exercise their discretion honestly, the courts have no power to interfere. And for a trust for the benefit of animals, see *In re Dean* (1889), 41 Ch. D. 552.

remainder absolutely in case there are no children of the marriage. Here he is both settlor and *cestui que trust*. And, as we shall see, sometimes a settlor, instead of conveying the trust property to a trustee, declares himself a trustee of it for the benefit of the *cestuis que trustent*. Here one person is at once both settlor and trustee. And sometimes a person conveys his own property to himself and other trustees in trust for himself for life and afterwards for others—his wife and children generally. Here the same person is at the same time settlor, trustee, and one of the *cestuis que trustent*. But it is to be noted, that no person can be trustee for himself *only*. Once he has vested in him both the nominal and beneficial interests, he is the owner of the whole property, however the instrument conveying the property to him may describe him. Thus, to adopt the last example given as an illustration, if A. declares himself trustee of his property for himself for life, then for his wife for life, and then for the children of the marriage equally in case there are any children, but in case there are no children for himself absolutely, then should A.'s wife die during A.'s lifetime without having any children, A. would not become a trustee of the trust property for himself, but absolute owner in law and equity.

Kinds of Trusts.—Trusts may be classified, either according to the duties of the trustees, or according to the nature of the *cestui qui trust*, or according to the mode in which they were created.

Classified according to the duties of trustees, trusts are either *simple* or *special*. A simple trust is one where no specific duties in respect to the trust property are imposed by the instrument; but these are left to be defined by the law. Here all that the trustee has to do is to allow the *cestui que trust* for the time being to enjoy the profits of the trust property, and, if he is the sole *cestui que trust* and *sui juris*, to convey the trust property as he may direct. A special trust is one where specific duties, in regard to

the trust property, are imposed on the trustee by the instrument creating the trust. This distinction between active or special and passive or simple trusts is of little importance as far as trusts themselves are concerned, since the law as to passive trusts is also the law as to active trusts, save in so far as it is altered by the particular instrument creating a particular active trust. But sometimes the distinction is important as determining whether there is a trust at all. The Statute of Uses, 1535, applies only to simple uses (*e*) or trusts of freehold land ; and accordingly what on the face of it purports to be a trust of lands may or may not be so, according as the trustee to uses has, or has not, active duties imposed upon him (*f*).

Classified according to the nature of their *cestuis que trustent*, trusts are either *private* or *charitable*. Shortly, the difference between a private and a charitable trust is this : the former is for the benefit of particular individuals, the latter is for the benefit of persons, not as individuals, but as members of the public, or not for persons at all, but for public institutions (*g*) of a charitable nature. All public purposes are not charitable purposes. Thus, it has been recently held, that a trust for the advancement of yacht racing (*h*), and another for the purchase of advowsons (*i*), are not charitable trusts. Generally speaking, a public purpose, to be charitable, must come within the objects described as charitable in the Charitable Trust Act, 1601 ; and, if it comes within such objects, it does not matter whether the persons or institutions to be benefited are in England or abroad (*k*).

Classified according to the mode in which they are created, trusts are either *express* or *implied*. An express

(*e*) See Strahan, *Intro. to Conveyancing*, p. 11.

(*f*) See *Van Grutten* v. *Foxwell*, [1897] A. C. 658.

(*g*) *Re Mann*, *Hardy* v. *Att.-Gen.*, [1903] 1 Ch. 232.

(*h*) *Re Nottage*, *Jones* v. *Palmer* (No. 1), [1895] 2 Ch. 649.

(*i*) *Hunter* v. *Att.-Gen. and Hood*, [1899] A. C. 309.

(*k*) *Re Geck*, *Freund* v. *Steward*, W. N. (1893), 161 ; 69 L. T. 819.

trust is one which arises because the settlor constitutes it by declaring his intention to that effect in words or by conduct. An implied trust is one which the settlor does not expressly constitute, but which the court, from the surrounding circumstances, presumes he intended should be created. Implied trusts are usually divided into two classes, *resulting* and *constructive*. A resulting trust is one where, though the settlor has vested property in another person without any suggestion of that person being a trustee for him, yet the court presumes such was his intention. Constructive trust is generally used as descriptive of the relationship between the legal owner and the equitable owner, whether the legal and equitable interests have become separated with or without any intention on the part of anyone to create a trust (*l*). Here, however, we are discussing trusts which arise out of actual confidence or undertaking. We will, therefore, for present purposes, confine ourselves to trusts which, though not intended to be created, yet arise by construction of law, owing to the fiduciary relationship between the parties.

We propose to use this last classification as the basis for the arrangement of what we have to say as to trusts. When the law is modified according as the trust is simple or special, private or charitable (*m*), we will point out the modification in passing.

Express Trusts.

Constituting Express Trusts.—An express trust can be completely constituted (1) by the settlor transferring by regular assurance the intended trust property to trustees, who, by their acceptance of it, undertake to hold it on the trust declared by him, or (2) by the settlor himself retaining the property, but, by express declaration or by

(*l*) See *per* Lord Lindley, *Hardoon v. Belilios*, [1901] A. C. 118, at p. 123.

(*m*) For a succinct statement of the differences between private and charitable trusts, see Ashburner, *Equity*, pp. 154 *et seq.*

conduct, undertaking to hold it on the trusts he declares (*n*).

As an example of the conduct, which without any express declaration, would constitute a person trustee of money under his control, we may note, if a person receives money on account of another, and pays it into his own bank, but to a separate account, he constitutes himself a trustee of such money (*o*), and is no longer a mere debtor to the person for whom he has received it.

Whatever mode is followed, no trust will be held to be constituted, unless the language used or the conduct of the parties makes these points certain. In the first place, it must make certain that it was intended to constitute a trust. The tendency of the courts at one time was to treat every expression of a donor, or more especially a testator, of his wishes as to what the donee or legatee should do with the property given or bequeathed, as establishing what was called a *precatory* trust binding the donee or legatee's conscience. This tendency now has been reversed. It is for him who alleges a trust to prove it; and the court will not turn a donee into a trustee, unless it is clear that such was the intention of the donor (*p*).

In the second place, to constitute a trust, it must be certain to what property the trust is to attach. Not unfrequently, testators give the income of property for life to a legatee, with leave to resort to the capital if the income is not sufficient; and then attempt to declare a trust of what remains of such property on the legatee's death. Here the trust will fail, as of no definite part of the legacy is the trust declared (*q*).

(*n*) *Per* JESSEL, M.R., in *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11, at p. 14.

(*o*) *Per* Lord SELBORNE, in *Lyell* v. *Kennedy* (1889), 14 App. Ca. 437, at p. 457.

(*p*) *Re Adams and the Kensington Vestry* (1884), 27 Ch. D. 394; *Hill* v. *Hill*, [1897] 1 Q. B. 483; *Re Williams*, [1897] 2 Ch. 12.

(*q*) *Re Richards*, *Uglow* v. *Richards*, [1902] 1 Ch. 76; *Curtis* v. *Rippon* (1820), 5 Madd. 434.

In the third place, the *cestuis que trustent* must be certain. If it is not clear whom the settlor intended to benefit, then the trust fails. But where the trust is a charitable one, uncertainty as to the exact persons or institution to be benefited, will not invalidate the trust, provided the settlor has shown a general intention of charity (*r*), that is, an intention that the money given shall be used for charitable purposes, whether the precise objects he himself prescribes can be carried out, or not. When the trust money is applied to other than the precise objects stated by the settlor, the trust is said to be carried out *cy près*.

If these three points—called the three certainties—are made clear, no formal language is necessary to the declaration of a trust. Nor were any other formalities required originally. A trust was, as the phrase is, *averrable*—that is, could be declared by parol—and the declaration could be proved by any evidence which would establish any other fact. This has now been to a great extent altered by statute.

In the first place, by section 7 of the Statute of Frauds, it is enacted, that all declarations or creations of trusts or confidences of lands, tenements or hereditaments, shall be proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

These points in this enactment may be noted as regards trusts declared *inter vivos*: First, it applies only to trusts of lands (which includes leaseholds), tenements, and hereditaments; accordingly trusts of *pure personalty* are still averrable (*s*). Secondly, the declaration need not be made, but only *proved*, by writing. Accordingly, the writing will be sufficient, although it was made long after the trust was declared (*t*). Thirdly, a *writing* only and

(*r*) *Re Davis, Hannen* v. *Hillyer*, [1902] 1 Ch. 876; *Blair* v. *Duncan*, [1902] A. C. 37.

(*s*) *M'Fadden* v. *Jenkins* (1842), 1 Ph. 153.

(*t*) *Gardner* v. *Rowe* (1828), 5 Russ. 258.

not a deed, is necessary. And lastly, the writing is to be signed by the party who is by law *enabled to declare the trust*. This, as we have seen, is the beneficial owner.

In the second place, as to trusts *declared by will*, the enactment contained in section 7 has now been superseded by the requirements of the Wills Act, 1837. It may be taken that, under the latter statute, the equitable, no more than the legal, interest or estate in property of *any* kind, can be disposed of after death, by any direction by parol, or in writing, other than one contained in a will executed in accordance with that statute (*u*).

As regards, however, both the Statute of Frauds, 1677, and the Wills Act, 1837, the object of such statutes is to prevent, not to protect, fraud. Accordingly, if a person obtains possession of property in the character of trustee, he will not be allowed to keep it on the ground that the trusts, not having been declared in writing, cannot be proved within the statute (*x*). Nor in the same way, will an heir who induced his ancestor to make no will, by promising to use the land descendible to him in a certain way, or the legatee who undertook that if a legacy were left to him he would hold it on trust for a certain purpose, be permitted to take advantage of his fraud (*y*).

Completely Constituted Trust.—An express trust constituted by transfer to a trustee of the trust property, very closely resembles the ordinary contract of bailment. Indeed bailment might reasonably enough be considered a common-law trust. And, in many respects, as we have seen, equitable rights and interests, as respects persons not

(*u*) *Re Boyes*, *Boyes* v. *Carritt* (1884), 26 Ch. D. 531; *Re Hetley*, *Hetley* v. *Hetley*, [1902] 2 Ch. 866; cf. *Re Huxtable*, *Huxtable* v. *Crawfurd*, [1902] 2 Ch. 793.

(*x*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*y*) See *Re Stead*, *Witham* v. *Andrew*, [1900] 1 Ch. 237. The rule affecting wills is stated here very compendiously, and must not be taken as exhaustive. See Ashburner, *Equity*, pp. 133 *et seq.*, and Underhill, *Trusts*, pp. 52 *et seq.*

parties to their creation, have many of the incidents of mere contractual rights. At the same time, in some respects, the effect and operation of the complete constitution of a trust in equity are more akin to those of a conveyance at law, than they are to the effect of a contract either in law or in equity. And this because in equity the constitution of a trust *is* a conveyance. It transfers at once an equitable estate in the trust property. So, it may be said, does a contract for the sale of land. That is true, but still a contract for the sale of land remains in equity a contract, while a completely constituted trust is, and has the usual incidents of, a conveyance. This will appear from the following considerations.

A contract must always be, or be based upon, an agreement to which the obligor and obligee were parties. Thus, if A. contracts to sell certain land to B. to be conveyed to C., C., not being a party to the agreement or contract, has no rights under it (*z*). If A. refuses to carry out the contract, C. cannot, either by legal or equitable proceedings, compel him to do so. A declaration of trust being the conveyance of an estate in the land, there is no more need in equity that there should be an agreement between the grantor and the grantee, than there is in law in case of an ordinary conveyance. In law, a grantee may take under a conveyance of the execution of which he was entirely unaware at the time it happened (*a*); and so in equity a *cestui que trust* may take under a declaration of trust which was made before he was born, or which was concealed from him for years after it was made. Accordingly, if A. declares a trust of certain lands in favour of B., though B. was no party to any agreement for such declaration, B. will at once become entitled in equity to the lands in question, and able to compel A. to hold them for his benefit.

(*z*) Unless B. made the contract as trustee for C. See Ashburner, *Equity*, p. 113 *et seq.*

(*a*) See *Re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143.

Again, an agreement in law is enforceable only when it is based on valuable consideration—actual or imported, as in the case of a deed—and then only by a person who is party, not only to the agreement, but to that consideration also. Thus, if A. agrees with B. to make B. a present of a horse, on A. subsequently refusing to carry out his agreement, B. has no remedy. But a declaration of trust being a grant, there is no more need in equity for the grantee to have given the grantor consideration for the grant, than there is in law in the case of an ordinary conveyance or gift by delivery. Thus, if A. declares himself trustee of a horse in favour of B., B. having given no consideration, then B. becomes immediately the owner in equity of the horse, and can call on A. to hand it over at any time. And there being no necessity for any consideration to support a declaration, it follows, that if there is in fact a consideration, there is no necessity for the *cestui que trust* being a party to it.

Incompletely constituted Trusts.—It is to be noted, that this doctrine that the constitution of trust is a conveyance, applies only when the trust is *completely* constituted. As long as it remains incomplete, or a "trust *in fieri*," as it is sometimes called, equity will not regard it as a grant, unless it is also based on valuable consideration. Thus, if, in the case last given, A. had merely *promised* to declare the trust in favour of B., then, unless B. had given A. consideration for the promise, B. would have taken no interest in equity any more than in law, until A. had actually declared the trust. And if A. had intended, not to declare a trust, but to make a *gift* of the horse to B., and such gift was ineffectual in law for some reason or other—such as not being completed by delivery of the horse (*b*)—equity would not aid B. to obtain the horse, by turning A.'s words of gift into a declaration of trust in B.'s favour. The rule is, that equity will not aid a volunteer, by con-

(*b*) *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57.

struing a gift to operate in a different way from that intended (*c*).

Difficult questions, as to whether a trust was completely constituted or not, used formerly to arise when a settlor purported to assign to trustees property which at law was not assignable. Of late, however, owing to legislation, which has made nearly everything which can be called property assignable at law, the difficulties now arise chiefly where there has been no attempt to assign, but only an agreement to settle. This occurs frequently in connection with marriage articles—that is, agreements to create trusts made in consideration of intended marriages. Now, marriage in equity, as in law, constitutes a valuable consideration; and so such an agreement is enforceable in law and equity, and, when constituted, the trust is not a voluntary trust, but a trust for value.

The difficulties which arise under marriage articles, then, are not that they are not based on value, but on the second point—that an agreement to create a trust, like any other contract, can be enforced only by a person who is not merely a party to the agreement, but a party also to the consideration. The question, then, is, who is a party to, or as the phrase is, *within* the marriage consideration? It has now been decided that, besides the husband and wife, the issue of the marriage, and the trustees whose duty it is to protect their interests, are within it. But all others taking benefits under the articles are, so far as the marriage consideration is concerned, *volunteers;* that is, they give no consideration (*d*). Of course, if the trust money was provided by persons other than the intended husband and wife—such as their parents—they will have given consideration other than marriage, for any interests taken by them under the articles. The result is, that if the intended settlement is duly constituted, and the trust

(*c*) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264.

(*d*) *De Mestre* v. *West*, [1891] A. C. 264; *Att.-Gen.* v. *Jacobs-Smith*, [1895] 2 Q. B. 341.

property transferred to the trustees, volunteers under it will be entitled to the interests reserved to them, just as much as if they had given value. But if it is never duly constituted—and volunteers will have no right to have it duly constituted—those giving value may, if all are *sui juris*, join to cancel the articles, though the result may be to defeat the interests of the volunteers under it. Thus, suppose A. by articles agrees to settle 10,000*l*. for the benefit of his intended wife for life, then of her children by the marriage and also of her children by a previous marriage. In this case, if no actual settlement is made, and the wife predeceases A., there is nothing to prevent A. and the children by the second marriage (who are purchasers for value), joining to annul the marriage articles, and so depriving the wife's children by her first marriage—who are volunteers—of the provision intended for them.

Incompletely constituted trusts, even when supported by a marriage consideration, are by section 47 of the Bankruptcy Act, 1883, made liable to fail. By that enactment, covenants in consideration of marriage to settle, on the settlor's wife or children, specific property (*e*) in which the settlor had no interest vested or contingent at the date of his marriage, and not being property of or in right of his wife will, on the settlor becoming bankrupt before the property has been actually transferred, be void as against his trustee in bankruptcy.

In what we have above said, we have been speaking of trusts incompletely constituted *inter vivos*. In the case of a trust created by will, what has been said has no application, for the reason that a will is, both in law and equity, a conveyance. Accordingly, every trust arising under a will is, from the death of the testator, a completely constituted trust; and no question of consideration or being party to a consideration can arise.

(*e*) *Ex parte Bishop, Re Tönnies* (1873), L. R. 8 Ch. 718.

Voluntary Trusts.—Voluntary trusts, whether completely constituted or not, are subject to further serious disadvantages as compared with trusts for value. These consist now of their liability to be set aside as against the settlor's trustee in bankrupty or the settlor's creditors.

The first of these disadvantages is imposed by section 47 of the Bankruptcy Act, 1883. By that section it is declared that a voluntary settlement is void (a) if made within two years before the settlor's bankruptcy or liquidation, or (b) if made more than two years, but within ten years before such bankruptcy or liquidation, unless it can be shown that the settlor was solvent at the date of the settlement, without the aid of the property comprised in the settlement, and that the settlor's interest in such property passed to the trustee of the settlement on the execution thereof.

An exception is made in respect of property which has accrued to the settlor since marriage in right of his wife, and of a policy of insurance for the benefit of his wife and children, under section 11 of the Married Women's Property Act, 1882.

By "void" in section 47 is meant, not void *ab initio*, but void from the time the title of the trustee in bankruptcy arose (*f*).

The second disadvantage is imposed by 13 Eliz. c. 5. Section 1 of that statute enacts, that a settlement of realty or any personalty which might be taken in execution (*g*), made by a settlor with the intent of delaying or defeating his creditors, is to be void. This general enactment is, however, practically restricted to voluntary settlements by section 5, which enacts, that where the settlement is made for value, it is not to be void unless the person giving value was a party to the settlor's fraud; and so, even a voluntary settlement will be valid, where a subsequent purchaser, without notice of the fraud, has given value for the interests created under it.

(*f*) *In re Carter and Kenderdine*, [1897] 1 Ch. 776.

(*g*) *Rider* v. *Kidder* (1805), 10 Ves. 360.

In order to show that a settlement was made with the object of delaying or defeating creditors, it is not necessary to prove an actual intention to this effect on the part of the settlor. Such intention will be presumed, if it is shown that it was made by the settlor under circumstances naturally calculated to have this result as to his then or future creditors, and that it in fact has had that result (*h*). Thus, a voluntary settlement made by a settlor just before entering into a hazardous enterprise, will sufficiently indicate such an intention (*i*). So will a voluntary settlement on the settlor's daughters at a time when he expected judgment in a then pending action to be given against him (*k*). The fact that in a voluntary settlement the life interest reserved to the settlor is made determinable on his bankruptcy is also a circumstance strongly indicating that the settlement was intended for the purpose of defeating creditors. Indeed, at one time such a condition was held to be conclusive on the question (*l*) ; but that view can be considered good law no longer (*m*). In the words of VAUGHAN WILLIAMS, L.J., in *Re Holland*, *Gregg* v. *Holland* (at p. 372) (*m*), the rule now is that "in each case you must look at the whole of the "circumstances surrounding the execution of the convey-"ance, and then ask yourself the question whether the "conveyance was in fact executed with the intent to "defeat or delay creditors." This seems in accordance with the decision in *Peek* v. *Derry* (*n*), which put an end to the equitable fiction of "constructive" fraud.

Lastly, voluntary settlements of lands might under 27 Eliz. c. 4 have been defeated by the subsequent sale of the settled lands to a purchaser for value. We need not, however, discuss this enactment now, since by the

(*h*) *Freeman* v. *Pope* (1870), L. R. 5 Ch. 538, at p. 543.

(*i*) *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106.

(*k*) *Reese River Company* v. *Attwell* (1869), L. R. 7 Eq. 347.

(*l*) *Re Pearson* (1876), 3 Ch. D. 807.

(*m*) *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360.

(*n*) (1889), 14 App. Ca. 337.

Voluntary Conveyances Act, 1893, it is enacted, that no voluntary settlement, whether made before or after the passing of the Act, if made *bonâ fide*, shall henceforth be deemed fraudulent within the meaning of 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of that Act by a conveyance made upon any such purchase.

Incompletely Expressed Trusts.—An incompletely constituted, must be clearly distinguished from an incompletely expressed trust. A completely expressed—or *executed*—trust, is a trust wherein the settlor has set out completely the limitations on which the trust property is to be held; where, in the words of Lord ST. LEONARDS (*o*), "he has been his own conveyancer." Thus, a trust to pay the income of the trust property to A. for life, and on A.'s death to hold the corpus for the children of A. in such proportion as A. should appoint, and in default of such appointment for them in equal shares, would be an executed trust. An incompletely expressed—or *executory*—trust, is a trust wherein the settlor merely gives a general direction as to the limitations on which the trust property is to be held; where, in the words of Lord CAIRNS (*p*), the trust is executory in this sense, that "it is to be executed by the "preparation of a complete and formal settlement carrying into effect, through the operation of an apt and "detailed legal phraseology, the general intention compendiously indicated by the" settlor. Thus, a trust that certain freeholds, leaseholds, furniture, plate, etc., should follow the barony of B. as nearly as practicable, and according as the trustees should think proper or counsel should advise, would be an executory trust (*q*).

Executory trusts frequently occur in marriage articles

(*o*) *Egerton* v. *Earl Brownlow* (1853), 4 H. L. C. 1, at p. 210.

(*p*) *Sackville-West* v. *Viscount Homesdale* (1870), L. R. 4 H. L. 4 3, at p. 571.

(*q*) *Sackville-West* v. *Viscount Holmesdale*, *supra*; cf. *Re Johnstone*, *Cockerell* v. *Earl of Essex* (1884), 26 Ch. D. 538.

where, as we have seen, the trust created is usually incompletely constituted. But they also frequently occur in wills where, as we have also seen, the trust created is always completely constituted. It is to be remembered, then, that the fact that a trust is executory does not in any way decide whether it is merely in essence a contract to create, or an actual conveyance of, the interests arising under it.

The importance of the distinction between executed and executory trusts depends on the different rules of interpretation applicable to them severally (*r*). An executed trust is construed by the court precisely as if it were a limitation of the legal estate (*s*). Thus, the Rule in *Shelley's Case* will apply to an executed trust, where the technical expressions are used, just as it would apply to a direct limitation (*t*). On the other hand, executory trusts are construed liberally (*u*), and, where it is clear that the settlor had a different intention, the court will not defeat such intention by applying any technical rule, or by giving a technical meaning to technical words (*x*). Further, where the executory trusts arise under marriage articles, the court will presume, till the contrary is shown, that the intention of the parties was to provide for the issue of the marriage, and will not so interpret the trusts as to defeat this object. Thus, on marriage articles directing the settlement of freehold land in trust for the husband for life, and then for the husband's heirs male by the wife, the court will hold that it was intended to give the husband a life estate with remainder in tail to his sons by his then wife; and not to create a special tail, which might enable him to appropriate the whole estate to his own benefit (*y*).

(*r*) See Underhill and Strahan, *Inter. of Wills and Settlements*, p. 232.

(*s*) *Re Whiston's Settlement*, [1894] 1 Ch. 661.

(*t*) *Jervoise* v. *Duke of Northumberland* (1820), 1 J. & W. 559.

(*u*) *Papillon* v. *Voice* (1728), 2 P. Wms. 471.

(*x*) *Lord Glenorchy* v. *Bosville* (1733), 2 W. & T., L. C. 763; *Blackburn* v. *Stables* (1814), 2 V. & B. 367.

(*y*) *Trevor* v. *Trevor* (1720), 1 P. Wms. 622.

In the same way, while a limitation in an executed trust which is contrary to the Rule of Perpetuities, or otherwise illegal, fails, a direction in an executory trust to settle in a way that would break such rule, or be otherwise illegal, will, if possible, be so adapted as to make the limitation good (z).

Implied Trusts.

Implied trusts, as we have seen, are divided into two classes: (1) Resulting trusts, where, though there is no expression by word or conduct that a trust in the settlor's favour was intended, yet the court presumes that the settlor intended to create such a trust. (2) Constructive trusts, where, independently of any intention to create a trust, the court holds that a trust exists. We will discuss shortly each of these.

(1) *Resulting Trusts.*—Resulting trusts may arise (a) where no express trust of any kind is created, but property is transferred to a person who gives no value for it; (b) Where an express trust is duly constituted, but the trusts are not declared, or those declared are not binding on the settlor, or do not exhaust the whole beneficial interest in the trust property. In either of these cases, the court may on principle, or on the surrounding circumstances, hold that a trust of the beneficial interest, or of the residue of it, in favour of the person providing the trust property was intended, until the contrary is shown. They are called resulting trusts because the beneficial interest results back to the person who provided or paid for the trust property.

(a) Resulting trusts of the first kind may arise where one person pays the purchase money for property which is transferred, not to him, but to another person, or where

(z) *Humberston* v. *Humberston* (1716), 1 P. Wms. 332; *Re Russell, Dorrell* v. *Dorrell*, [1895] 2 Ch. 698.

the owner of property transfers it to another person who gives him no consideration for it.

As has been seen (*a*), no consideration is necessary to support a legal conveyance of the legal estate, or an equitable conveyance of the equitable estate. Yet here is an equitable rule which requires under certain circumstances a valuable consideration in the case of either a legal or equitable conveyance, in order to rebut a trust which the person providing or paying for the property is presumed to have intended to create, but which he was too stupid or too negligent to mention. This doctrine prevails, too, in spite of the modern rule, that where anyone alleges that a person who on the face of the assignment is a donee, is really a trustee, it lies on him to prove the trust (*b*).

This doctrine would probably never have been invented but for two practices, now long obsolete, which made it originally reasonable. The first was the practice of feoffments to uses, especially to the uses of the feoffor's will (*c*). Very often the uses were declared orally, and, once the feoffor was dead, if the feoffee denied the uses, it was nearly impossible to prove them. To prevent frauds, it was necessary for the Court of Chancery to hold that where a feoffee gave no value he must be considered *primâ facie* a feoffee, to the use of or, after the Statute of Uses, a trustee for, the feoffor. This consideration ceased to have any practical value after the passing of the Statute of Wills, as was recognized by the legislature in the Statute of Frauds, 1677. The second practice was the system of conveying freeholds to the purchaser and another as joint tenants, for the purpose of barring the purchaser's wife's right to dower (*d*). Where the court found that property was conveyed to the purchaser and another, or to others than the purchaser, it was natural

(*a*) *Supra*, p. 495.
(*b*) *Supra*, p. 491.
(*c*) *Supra*, vol. I. p. 356.
(*d*) *Supra*, vol. I. p. 159.

enough, in view of this practice, to hold, where the stranger or strangers were not expressly declared to be trustee or trustees for the purchaser, that this was merely due to an oversight, and that the real object of the purchaser in having the property thus conveyed was to bar dower. When the reason of the rule was forgotten, the rule was extended to purchases generally, and based on some other consideration which, it is submitted, is neither very clear nor very reasonable (*e*).

The rules with regard to resulting trusts of the first kind may be shortly stated thus: Where one person as purchaser pays for property which, at his request, is transferred to him jointly with another or others, or to another or others jointly, this other or these others are presumed to be trustees of the interests they take, for the person paying the purchase money. This principle is mitigated by two sub-rules. The first is that, as such presumption amounts to holding that the person paying the purchase money did not mean what his instruments and acts say he meant, parol evidence of the settlor's declarations *before*, and of the persons taking the property *before and after* the conveyance, may be given to show that he actually did mean what these say. The second is, that where the person paying the purchase money is the husband of the other person, or the father of the other person or persons, or *in loco parentis* to the other person or persons, or the other person or persons were trustees of a settlement, by which the person paying the purchase money settled property in favour of somebody else (*e*),—then the presumption that he intended only to benefit himself when he bought property for someone else is rebutted (*f*). But parol evidence will again be admitted to show that he did not really mean what his instruments and acts show he meant (*g*). The same rule applies to

(*e*) *Re Curteis' Trusts* (1872), L. R. 14 Eq. 217.

(*f*) *Standing* v. *Bowring* (1885), 31 Ch. D. 282.

(*g*) In *Bennet* v. *Bennet* (1879), 10 Ch. D. 474, that great lawyer, JESSEL, M.R., puts the doctrine on the ground of moral obligation.

transfers of property into the names of the owner and another or others jointly, or into the names of another or others jointly, with this limitation—due to section 7 of the Statute of Frauds (*h*)—that the rule does not apply to transfers of realty (*i*).

It is submitted that rules better calculated to promote litigation and perjury than the above it has rarely been the evil fortune, even of Chancery lawyers, to invent.

(b) Resulting trusts of the second kind arise, as has been already said, only where an express trust has been duly constituted, and consist of three classes.

The first class—where the trust is constituted, but the trusts are not declared—needs little illustration. Where the instrument transferring the property clearly states that the transferee takes as trustee, but fails to declare the trusts, of course the trustee cannot benefit by the transfer. In the absence of evidence to show what the trusts were—and parol evidence cannot be admitted where (1) the property is realty or (2) the trust is created by will unless to prevent a fraud—there is a resulting trust in favour of the settlor (*k*).

The second class arises where the trusts declared are not binding on the settlor. This class is itself divisible into two sub-classes. The first is where the trusts are intentionally created for an unlawful purpose. There they are not binding on the settlor, and he can reclaim the property,

He then holds that a mother is under no moral or "moral legal obligation" to provide for her children, and therefore when she makes a purchase in their names there is no presumption of advancement. As far as I am aware there is no "moral legal obligation" on a father to advance his children; and therefore, in his case, too, there should be no such presumption. It is submitted that this decision is absolutely wrong in principle, and that the sole question is, what was the purchaser's intention? Certain circumstances, of which relationship is one, suggest that his intention was bounty; but this may be rebutted by showing such in fact was not his intention.

(*h*) *Supra*, p. 492.

(*i*) *Fowkes* v. *Pascoe* (1875), L. R. 10 Ch. 343.

(*k*) *Barrs* v. *Fewkes* (1864), 2 H. & M. 60; cf. *Longley* v. *Longley* (1871), L. R. 13 Eq. 133.

if he intervenes before the unlawful purpose is carried out, or if the court thinks that the public purposes are best served by restoring the property to the settlor. Otherwise, though the trusts are void, the rule is, *in pari delicto, potior est conditio possidentis;* and the trustee will be entitled to keep the property discharged of the trusts.

The second sub-class arises where the trusts are impossible, or contrary to some technical rule of law, or are, in fact, for the settlor's own convenience. The commonest example of impossible trusts is where the object for which the trust was created has ceased to exist; as where a marriage settlement is executed, but no marriage ever takes place. The commonest example of trusts contrary to a technical rule of law is a trust contrary to the Rule against Perpetuities. It may be noticed, however, that the Rule against Perpetuities has no application to trusts in favour of charities. A condition may be attached to such a trust for ever, provided that the limitation over on breach of the condition is not to an individual, but to another charity (*l*). The commonest example of a trust which, while nominally for the benefit of others, is yet really for the settlor's own convenience, is the case of a trust for the payment of the settlor's debts. Such a trust may be revoked by the settlor at any time before the creditors become actual parties to it (*m*), or give value by delaying the claims for their debts in reliance upon it (*n*). When either of these events takes place, the trust becomes binding on the settlor, as far as those so becoming parties or giving value are concerned.

The last class arises, where the settlor has declared trusts which do not exhaust the whole income, or (as the case may be) the whole *corpus* of the trust property. Here

(*l*) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Re Bowen*, [1893] 2 Ch. 491. See Strahan, *Law of Property*, p. 178.

(*m*) *Cosser* v. *Radford* (1863), 1 De G. J. & S. 585.

(*n*) *Johns* v. *James* (1878), 8 Ch. D. 744; cf. *Garrard* v. *Lord Lauderdale* (1830), 3 Sim. 1.

two questions may arise. The first is whether the gift is entirely on trust, or whether it is only a gift to the *trustee*, subject to the performance of the trust. If it is the first, then, if the trust does not exhaust the beneficial interest in the trust property, there is a resulting trust of the residue ; but if it is the second, the residue after the performance of the trust belongs to the trustee. The second question that sometimes arises is, whether the trust property is disposed of only in so far as is necessary to perform the trusts declared, or whether it is disposed of altogether in favour of the *cestuis que trustent*. Again, if it is the former, there is a resulting trust of any residue ; but if the latter, the *cestuis que trustent* take the whole property. An example will show the distinction. As a rule, where a debtor assigns his property to trustees for the payment of his debts, then, after all the debts are paid, there is a resulting trust to him of any residue. But where the assignment is not merely for the payment of his debts, but is to "pay and divide" the trust property among his creditors, "in rateable proportions, according to the amount of their "several and respective debts," this is an absolute assignment for the benefit of the creditors ; and the whole trust property is divisible among them (*o*).

(2) *Constructive Trusts.*—Constructive trusts, as we have already said, are usually held to include all cases where the legal and equitable ownership of property becomes vested in different persons. Here, however, we will confine the term to trusts which arise by construction of law, owing to the fiduciary relationship between the parties.

Taken in this sense, a constructive trust is not so much an actual trust, as the relationship which arises upon the breach of an actual trust or confidence. Thus, the trustee of leaseholds who renews the lease for his own benefit, a trustee of any property who makes improperly any profit

(*o*) *Smith* v. *Cooke*, [1891] A. C. 297 ; *Cunnack* v. *Edwards*, [1896] 2 Ch. 679.

out of his administration of it, a confidential agent who accepts a bribe, a doctor or solicitor who takes advantage of his position to obtain a gift from his patient or client,—are each respectively a constructive trustee of what he has received. In all these cases, the constructive trust arises, not out of actual confidence reposed as to the property received, but out of the breach of the general fiduciary relationship between the parties.

One primary distinction between constructive trusts of this kind and constructive trusts imposed by law, where no fiduciary relationship subsists, is, that in constructive trusts arising out of fiduciary relationships, as in express and resulting trusts, time is, in equity, no defence to an action for the recovery of the property subject to the trust (*p*). In the case of constructive trusts, where no fiduciary relationship subsists, the constructive trustee can always rely on lapse of time.

Part II.—Administration of Trusts.

Office of Trustee.—Trustees are, in the first instance, almost invariably appointed by the settlor. When the trust is created *inter vivos*, they show their acceptance of the trust by becoming parties to the instrument creating it. When it is created by will, they are entitled to accept or disclaim the trust as they please. A married woman must disclaim by deed (Real Property Act, 1845, s. 7); but a man (or *feme sole*) may disclaim by any writing or conduct which shows that he does not intend to accept the trust, in which case, though the trust property is bequeathed to him, no interest in it will vest in him (*q*). If all the persons nominated by the settlor as trustees disclaim, the court will nevertheless see that the trust is administered; it being a maxim of equity that the court will not allow a trust to fail for want of a trustee. In the same

(*p*) See *infra*, p. 526.

(*q*) *Re Birchall, Birchall* v. *Ashton* (1889), 40 Ch. D. 436.

way, a trust may be accepted by the trustee, either expressly, or implicitly by acting as trustee. If a trustee accepts any part of the trust, he accepts it all (*r*).

Once a person has accepted the trust, he is not entitled to retire when he pleases, unless the trust instrument gives him an express authority to do so. Usually this authority takes the form of a power vested in the tenant for life of the trust property, or some other person, to appoint new trustees in place of any of the original trustees who desire to retire. Whether there is any such power contained in the trust instrument or not, if there are more than two trustees, and there is nothing in the trust instrument to the contrary, one trustee may, with the consent of his co-trustees, and of the person entitled to appoint new trustees (if there is any such person), retire from the trust (*s*). He may also be discharged from the trust by the consent of all the *cestuis que trustent*, provided these are of full age and sound memory. In default of any of these, the trustee may obtain an order from the court discharging him, and appointing another trustee, or others, in his place.

Besides the statutory power referred to above, new statutory powers to remove trustees and appoint others in their places have been conferred by sections 10 and 25 of the Trustee Act, 1893, which codifies a large part of the law relating to trustees. By the first of these enactments, where a trustee, either original or substituted, and whether appointed by the court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating

(*r*) *Re Lord and Fullerton*, [1896] 1 Ch. 228.

(*s*) Trustee Act, 1893, s. 11.

the trust, or, if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representative of the last surviving or continuing trustee (which includes a sole (*t*) and a last retiring trustee) may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit, or being incapable as aforesaid. Large powers are given, on making such appointment, to vary the number of trustees, and to appoint separate sets of trustees for separate parts of the trust property. Any assurance necessary to vest the trust property in the new trustees is to be executed on such appointment; and the new trustees, both before and after the property is so vested, are to have the same powers, authorities, and discretions as the original trustees. This section applies only in so far as it is not excluded by the instrument creating the trust.

By section 25, the court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees, either in substitution for, or in addition to any existing trustee or trustees, or although there is no existing trustee. Under sections 26 to 35 the court, in making an order to appoint new trustees, or in cases where it is difficult or impossible to secure a conveyance of land or a transfer of securities held in trust, may make an order vesting the land or securities in the new trustees. By section 37, the new trustees appointed by the court are to have the same powers, authorities, and discretions, as the original trustees.

Trustees are invariably made joint tenants of the trust property, and accordingly, on the death of one, the whole

(*t*) *Re Shafto* (1885), 29 Ch. D. 247.

trust property remains in the survivors. The powers and discretions also remain in the survivors, unless an intention is expressed to the contrary in the trust instrument. On the death of a sole or last surviving trustee, the trust property and the trustee's powers, notwithstanding any attempted devise of the trust property, devolve, since December 31st, 1881, on his legal personal representative (*u*) ; except where the trust property is copyhold (*x*), when the old law applies, and the copyhold devolves, either on the trustee's customary heir, or on his devisee. It is submitted that by "legal personal representative" is meant, the executor or administrator who is appointed to administer the trustee's personalty in the country or district where the trust property — whether it is land or goods—is situate (*y*).

A trustee receives no remuneration for his trouble in administering the trust, unless the trust instrument expressly provides to the contrary. Provision has, however, been lately made by statute (*z*) for the appointment by the court, on the application of either an existing trustee or a *cestui que trust*, of a judicial trustee, either jointly with the existing trustee or as sole trustee, or in place of all or any trustees ; and he may be remunerated. A judicial trustee is an officer of the court, and must each year submit his accounts to the court. The fact that a trustee receives remuneration does not increase his liability, or alter his duties as trustee (*a*) ; though it has been suggested, that his acceptance of remuneration may be considered as constituting an implied undertaking on his part, that he has competent knowledge and skill in discharging the business of the trust (*b*).

(*u*) Conveyancing Act, 1881, s. 30.

(*x*) Copyhold Act, 1894, s. 88.

(*y*) See *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187 ; but cf. *Re Parker's Trusts*, [1894] 1 Ch. 707.

(*z*) Judicial Trustees Act, 1896, s. 1.

(*a*) *Jobson* v *Palmer*, [1893] 1 Ch. 71.

(*b*) *Per* Lord BLACKBURN in *Speight* v. *Gaunt* (1883), 9 App. Ca. 1, at p. 17.

Any person competent to hold property may be made a trustee. But the court will not appoint a person who is not *sui juris*, nor as a rule, one who is out of the jurisdiction, or is of bad character. A married woman may now be appointed as freely as a man (*c*). The donee of a power to appoint new trustees cannot appoint himself (*d*).

Estate taken by Trustees.—As has already been said, the question whether a trust is simple or special is important sometimes, as determining whether there is any trust at all. If freehold land is limited to trustees on a simple trust, then, unless it is also limited to their use, they take no estate whatever in the land, which, by virtue of (or, in the case of a will, by analogy to) the Statute of Uses, 1535, passes through them to the *cestuis que trustent*. This rule, however, does not apply to trusts of the equitable estate, or of leaseholds or pure personalty (*e*).

Where a trust of freehold land is created, the extent of the estate taken by the trustees will depend upon whether the trust is created *inter vivos* or by will. If it is created *inter vivos* they will take, precisely as in the case of any other conveyance, the estate limited to them by the instrument transferring it to them (*f*). But if it is created by will they will take, even where the words of the will are sufficient to pass the fee simple, only such an estate as is necessary for the execution of the trust (*g*). Thus, if freeholds are left to A. and B. and their heirs in trust to pay the net rents to C. for life, and on C.'s death in trust for D. and his heirs, A. and B. take only an estate for C.'s life—that is, only as long as their active duties as trustees continue (*h*).

(*c*) *Re Dickinson's Trusts*, [1902] W. N. 104.

(*d*) *Re Newen*, [1894] 2 Ch. 297.

(*e*) See Underhill and Strahan, *Interpretation of Wills and Settlements*, p. 180.

(*f*) *Colmore* v. *Tyndall* (1828), 2 Y. & J. 605.

(*g*) Wills Act, 1837, ss. 30, 31.

(*h*) *Blagrave* v. *Blagrave* (1849), 4 Exch. 550.

Position of Trustee.—The legal position of a trustee may be summed up shortly under four heads: first, his duties; secondly, his powers; thirdly, his rights; and fourthly, his liabilities.

Duties.—The positive duties of a trustee are thus summed up by LINDLEY, L.J., in *Low* v. *Bouverie* (*i*): "The duty of a trustee is properly to preserve the trust "fund, to pay the income and the *corpus* to those who are "entitled to them respectively, and to give all his *cestuis* "*que trustent*, on demand, information with respect to "the mode in which the trust fund has been dealt with, "and where it is." Taking this as our text, we will examine very shortly what each of these three positive duties involves.

1. To preserve the trust fund: In order to preserve the trust fund, the trustee must, in the first place, get in all the outstanding trust property; and, in the second place, must, if it be personalty, invest it in securities authorised by the trust instrument or by the law. Both in calling in and in investing, he must exercise his discretion as to what is most for the advantage of the trust.

If the trustee has made honest efforts to get in outstanding trust funds and failed, or has honestly and without negligence concluded not to attempt to get them in, on the ground that any effort to get them in would cost the trust fund more than would be thereby realized (*k*), he is not in default. In the case of new trustees, they are not liable for the default of their predecessors in getting in trust funds, or, indeed, in any other respect, unless they have reason to suspect it (*l*), and have made no efforts to protect the trust property. A trustee should, unless the trust instrument otherwise directs, or the property is settled specifically, realize all wasting and reversionary property, at any rate when the *cestuis que trustent* take successive

(*i*) [1891] 3 Ch. 82, at p. 99.
(*k*) *Re Brogden* (1888), 38 Ch. D. 546.
(*l*) *Ex parte Geares* (1856), 8 D. M. & G. 291, at p. 309.

interests in the income of the trust estate (*m*). If it cannot be realized, then the *cestui que trust* entitled for the time being to the income, should be paid merely interest on the value of the unrealized property, at the rate of three per cent. per annum.

As to investing the trust moneys, the securities in which they may properly be invested are often set out in the trust instrument itself. Where they are not so set out, and even where they are so set out, unless there is an intention to the contrary expressed in the trust instrument, the trustees may invest the trust property in any of the securities described in section 1 of the Trustee Act, 1893. The chief of these are, real securities in the United Kingdom, Government Stock of the United Kingdom and India, securities the interest of which is guaranteed by Parliament, Stock of the Banks of England and Ireland, Metropolitan Stock, and certain railway, water, and municipal stock, and any other stocks, in which money under the control of the High Court may be invested (*n*). Though the trustees are entitled to invest in any of these, yet, in making an investment, they must exercise their judgment and discretion in the interest of the *cestuis que trustent;* and in no case are they entitled to invest in an authorised security, when for any reason that particular security is for the time being of a speculative character, that is, has not acquired a fairly fixed value in the market (*o*). Nor (notwithstanding section 1 of the Trustee Act, 1893) are trustees, unless the trust instrument empowers them so to do, entitled to invest in or hold certificate to bearer issued under (a) the India Stock Certificate Act, 1863; (b) the National Debt Act, 1870; (c) the Local Loans Act, 1875; or (d) the Colonial Stock Act, 1877 (*p*).

Once the trust moneys are invested, it is the trustee's

(*m*) *Howe* v. *Lord Dartmouth* (1802), 1 W. & T. 68; *Re Bland, Miller* v. *Bland*, [1899] 2 Ch. 336.

(*n*) See Ord. XXII., r. 17, R.S.C.

(*o*) *Learoyd* v. *Whiteley* (1887), 12 App. Ca. 727, at pp. 731, 733.

(*p*) Trustee Act, 1893, s. 7.

duty to take proper care of the securities, or, in case of land, of the title deeds. As we shall see (*q*), a trustee is not justified in leaving these in the hands of his co-trustee, or his banker, solicitor, or other agent, after any reasonable need to do so has ceased.

A further duty follows from this duty to preserve the trust property; and that is, that, where there are several *cestuis que trustent* the trustee must not in any way favour any particular one at the cost of the others. If he gives an undue advantage to one, he is not preserving the trust property as far as the others are concerned.

2. To pay the income and *corpus* to the proper persons. Trustees are absolutely bound to pay the income and the *corpus* to the persons entitled under the trust instrument to such income or *corpus* respectively, or to persons entitled through them, of whose title the trustees have notice. If without negligence, and even through the fraud of someone else (*r*), they pay it to a person not entitled, they are not thereby discharged of their liability to the person who is entitled. This rule, which is rather a hard one, is mitigated by the fact, that in cases of doubt the trustees are entitled to consult the court, when, if they follow its directions, they incur no liability, and also by the relief that can now be given under the Judicial Trustees Act, 1896 (*s*).

The duties of the trustee, as set out above, indicate the rights of the *cestui que trust* as against him. The *cestui que trust*, if a life tenant, is entitled to have the income of the trust securities paid to him, and if the trust property is land, generally speaking, to be put in possession of it; subject (1) to a proper indemnity to the trustees in case the land is subject to mesne covenants, and (2) to the retention of the title deeds by them in case the *cestui que trust* has encumbered his equitable interest (*t*). If the

(*q*) *Infra*, p. 522.

(*r*) *Re Bennison*, *Cutler* v. *Boyd* (1889), 60 L. T. 859.

(*s*) See *infra*, p. 527.

(*t*) *Re Newen*, [1894] 2 Ch. 297.

cestui que trust or all the *cestuis que trustent* is, or are, absolutely entitled and *sui juris*, he is, or they are, entitled to put an end to the trust, and demand the complete transfer of the trust property.

3. To give information to the *cestuis que trustent*. The trustees must give all reasonable information to each and all of the *cestuis que trustent* and their solicitors, as to the state of the trust property, and must furnish evidence, such as inspection of title deeds, accounts, etc., to show this state. But they are under no obligation to tell a *cestui que trust* what his own dealings with the beneficial interest have been, or to aid him in making away with such interest (*u*).

Here, again, the duties of the trustee indicate the right of the *cestui que trust*. That right is to have a proper account of the dealings with, and of the revenue of, the trust property. If this is refused, the court will compel the trustee to account.

To these positive duties of trustees may perhaps be added two negative ones. First, trustees cannot, except so far as is permitted by the settlement, make money out of their trust; and, secondly, they cannot (except so permitted in the same way) buy, without the sanction of the court, the trust property from their co-trustees. As to the first of these duties, it will be sufficient to refer to the case of a trustee obtaining for his own benefit the renewal of a lease of the trust property (*x*), and of a trustee receiving a bribe (*y*) from, or even a share of the profits (*z*) made by, another person doing work for the trust. In all these cases, the trustee is constructive trustee of the renewed lease, bribe, or profits, as the case may be. As to the second rule, not merely is an active trustee not

(*u*) *Per* LINDLEY, L.J., in *Low* v. *Bouverie*, [1891] 3 Ch. 82, at p. 99.

(*x*) *Keech* v. *Sandford* (1726), Sel. Ch. Ca. 61; 2 W. & T. 693; cf. *Longton* v. *Wilsby* (1897), 76 L. T. 770.

(*y*) *Chandler* v. *Bradley*, [1897] 1 Ch. 315; *Re Smith*, [1896] 1 Ch. 71.

(*z*) *Re Thorpe*, *Vipont* v. *Radcliffe*, [1891] 2 Ch. 360; *Vipont* v. *Butler*, [1893] W. N. 64.

permitted to purchase trust property from his co-trustees, but one who has retired from the trust is not permitted to purchase it from those who were his co-trustees ; unless so many years have elapsed between the retirement and the purchase, as to preclude any suspicion that he retired for the purpose of buying the property (*a*).

A trustee may purchase the trust property from the *cestui que trust*, if the latter is *sui juris* and absolutely entitled. But if he does so, he must make a full disclosure to the *cestui que trust* of all the knowledge he has affecting the value of the trust property, or the sale may afterwards be set aside by the court (*b*).

Powers.—Powers or discretions of trustees arise either under the general law or under the settlement. Those arising under the general law, are either powers recognized in equity or powers conferred by statute. The former consist chiefly of such powers as, in the opinion of the court, are necessary to preserve and protect the trust property, and to benefit those under disability who are entitled beneficially to it. Many of them, as, for example, the power to allow maintenance out of income to infant *cestuis que trustent*, the power to retain a married woman's share in the trust funds to enable her to claim her equity to settlement, and the power to grant leases of settled lands, have now been either defined or superseded by statute. The most important now of these old equitable powers or discretions, is that which entitles trustees to take proceedings to protect the trust estate. This power is still effective (*c*), though the usual and most prudent way of proceeding, where the trust property is land, is for the trustees to obtain first the sanction of the court to the proposed action under section 36 of the Settled Land Act, 1882.

(*a*) *Re Boles and British Land Company's Contract*, [1902] 1 Ch. 244.

(*b*) *Dougan* v. *Macpherson*, [1902] A. C. 197.

(*c*) *Re Ormrod's Settled Estate* [1892] 2 Ch. 318.

The statutory powers, and those defined by statute, depend now chiefly on the Conveyancing Act, 1881, and the Trustee Act, 1893 (*d*). Those given by the Conveyancing Act, 1881, are, first, a power, where any property is held in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one, or on the occurrence of any event before his attaining this age, to pay to the infant's parent or guardian, if any, or otherwise for his maintenance, education, or benefit in the trustee's absolute discretion, the income or any part of it, whether or not there is any other fund for the infant's maintenance (*e*) (s. 43). The second power is one to manage the infant tenant's land during his minority, and apply the income or part of it at the trustee's discretion for his benefit; but this power is conferred only on trustees appointed for the purpose by the settlement (*f*), or, if there are none, on trustees with a power of sale or of consent to a sale, or, if there are none, on trustees appointed for the purpose by the court (s. 42). In both cases, the trustees are to accumulate the income not devoted to the infant's maintenance for the benefit of the person who, in the events that happen, becomes entitled to the income from which the accumulations rise (*g*).

The powers given by the Trustee Act, 1893, are more numerous. Perhaps the most important is that given by section 21 (2). Two or more trustees acting together, or a sole acting trustee, where by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and power thereof, may, if and as he or they may think fit, accept any composition or any security, real or

(*d*) Most of the powers given by the Trustee Act, 1893, are re-enacted from the Conveyancing Act, 1881.

(*e*) *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329; *Re Greares, Jones* v. *Greares*, [1900] 2 Ch. 683.

(*f*) See *Re Helyar*, [1902] 1 Ch. 391.

(*g*) *Re Scott, Scott* v. *Scott*, [1902] 1 Ch. 918.

personal, for any debt or for any property real or personal claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration or otherwise settle, any debt, account, claim or thing whatever relating to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith (*h*). This enactment applies only as far as no contrary intention is expressed in the trust deed; but it applies to trusts created before as well as after the commencement of the Act.

The other powers conferred upon trustees by the Trustee Act, 1893, may be put briefly. By section 20, the receipt of trustees for any money or other personal estate, is effectually to exonerate the person paying or transferring the money or personalty from seeing to its application, or being answerable for its loss or misapplication. By section 18, trustees have a power to insure against damage by fire any insurable property, to any amount not exceeding three-fourths of its full value. And, by section 19, they have power to raise money to pay the expense of renewing renewable leaseholds, part of the trust property. Sections 18 and 19 do not authorise the trustees to do anything which they are in the trust instrument expressly forbidden to do.

The powers conferred expressly on trustees by trust instruments vary so widely and are so numerous, that it is impossible to discuss them here. One only need be mentioned, that is, the usual trust for sale, since it is affected also by the Trustee Act, 1893, and earlier statutes. By the combined effect of these, a trustee for sale may sell the trust property, either by itself or in conjunction with other property not subject to the trust, according as it appears to

(*h*) See *Re Owens, Jones* v. *Owens* (1882), 47 L. T. 61, at p. 64.

him to be for the benefit of the trust funds; and, if the trust was created since January 1st, 1882, he may sell subject to prior charges, and concur with any other person in selling (*i*). With the leave of the court, he may sell the surface separately from the minerals (*k*).

Powers, whether arising under statute or under the settlement, may be either absolute or in the nature of trusts. If they are absolute, then, provided the trustee honestly uses his judgment in exercising or refusing to exercise them, the court cannot interfere (*l*). Most absolute powers are in reference rather to the *cestuis que trustent* than the trust estate. Powers in the nature of trusts, on the other hand, are powers which the trustee must exercise, though he has a discretion, which may be in its way absolute, as to how and when they shall be exercised (*m*). Here, if the trustee refuses to exercise them for an unreasonable time, or exercises them in an improper way, the court may interfere (*n*). Powers referring to the trust property are usually of this kind (*o*).

Finally, when a power created by a settlement coming into operation after December 31st, 1881, is vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument creating the power, the power may be exercised by the survivor or survivors of such trustees for the time being (*p*).

It may be added, that an order in a suit for the administration of the trusts, does not deprive the trustee of his discretion; but henceforth he must exercise it subject to the approval of the court (*q*).

(*i*) Trustee Act, 1893, s. 13 (1).

(*k*) *Ibid.* s. 44.

(*l*) *Gisborne* v. *Gisborne* (1877), 2 App. Ca. 300.

(*m*) *Re Hargreaves*, [1901] 2 Ch. 547 n.

(*n*) *Learoyd* v. *Whiteley* (1887), 12 App. Ca. 727; *Re Courtier*, *Coles* v. *Courtier* (1886), 34 Ch. D. 136; *Tempest* v. *Lord Camoys* (1882), 21 Ch. D. 571, at p. 578.

(*o*) *Tempest* v. *Lord Camoys*, at p. 577.

(*p*) Trustee Act, 1893, s. 22.

(*q*) *Tempest* v. *Lord Camoys*, at p. 578.

Rights.—The rights of a trustee are of two kinds. First, a right to an indemnity against all costs and liabilities properly incurred by him ; second, a right to the guidance and protection of the court in administering the trust.

As to the first of these, when a trustee properly incurs expenses in an action to protect the trust property (*r*), or in properly defending an action brought against him, either by a stranger or a *cestui que trust* (*s*), for something done by him or his agents in discharging the trust, or in managing the trust property (*t*), he is entitled to a lien both in the *corpus* and income of the trust property for them ; and where he has had to pay calls or other liabilities on the trust securities, he is not merely entitled to a lien upon these for them, but also has a personal remedy against the *cestui que trust*, at any rate, where the *cestui que trust* is absolutely entitled and is *sui juris* (*u*). A trustee is also entitled to his discharge, on the complete execution of the trust.

As to the second of these rights, the trustee is entitled to the guidance and protection of the court when questions of doubt or difficulty arise, in any of the following ways : First by taking a direction of a judge under Order LV., Rule 3 ; second, by paying the trust money into court to abide the order of the court (*x*) ; third, where the property cannot be paid into court, by commencing an administration action. The last two, however, are rights of doubtful value, except in cases where the difficulties of administration are so great as to lead the court to think the costs incurred by adopting them to be justified. If the court comes to another conclusion, the trustee may

(*r*) *Re Ormrod's Settled Estate*, [1892] 2 Ch. 318.

(*s*) *Walters* v. *Woodbridge* (1878), 7 Ch. D. 504 ; cf. *Re Beddoe*, *Downes* v. *Cottam*, [1893] 1 Ch. 547.

(*t*) *Stott* v. *Milne* (1884), 25 Ch. D. 710.

(*u*) *Hardoon* v. *Belilios*, [1901] A. C. 118.

(*x*) Trustee Act, 1893, s. 42.

find himself compelled to pay such costs out of his own pocket.

Liabilities.—We will consider very shortly the question of the liability of a trustee under four heads: first, his liability for his own acts or omissions; second, his liability for the acts or omissions of his agents: third, his liability for the acts or omissions of his co-trustee; and last, the extent of his liability.

1. Liability for his own Acts or Omissions.—Any deviation, with whatever intention, by a trustee from an absolute duty, is a breach of trust. Any exercise of a power which causes a loss to the trust property is a breach of trust, unless the trustee acted honestly and with reasonable care and prudence.

What amounts to reasonable care and prudence, is in each case a question of fact; but as regards loans of trust funds on the security of property a statutory rule has been laid down. By section 8 of the Trustee Act, 1893, a trustee making such a loan is protected, if he acts on the advice of a surveyor employed by him, whom he reasonably believes to be competent, and advances not more than two-thirds of the value of the property as certified by the surveyor. This enactment applies, however, only so far as the proportion of the loan to the value is concerned; it is the duty of the trustee to determine for himself whether the investment should be made (*y*).

2. Liability for Agents.—The principle applicable to a trustee is, that, being a delegate himself, he has no right to delegate his authority to others—*delegatus non potest delegare*. If he chooses to do so, the acts of his agents are regarded as his own, and his liability is just the same as if he himself had done them. To this rule an exception is made, where the agent employed is a mercantile agent, and the business transacted is such as is ordinarily transacted in the usual course of business through such agents. The

(*y*) *Learoyd* v. *Whiteley* (1887), 12 App. Ca. 727.

most common examples of such agents are bankers and brokers. Here again a statutory rule has been laid down. By section 17 of the Trustee Act, 1893, a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable security, and a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance. Neither the equitable nor the statutory rule, however, relieves the trustee of responsibility for loss incurred through leaving the property longer than is reasonably necessary in the agent's hands (*z*), or for any other act of negligence.

3. Liability for Co-trustee.—One trustee is not another trustee's agent, and therefore his acts are not the acts of the other. Thus, the receipt of trust money by one trustee will not be held a receipt of it by the other, even though the other joined in the discharge given the payor for it. This latter rule is due to the fact, that a person owing money to the trust cannot obtain a discharge, except from all the trustees, and so a trustee who signs the receipt without himself obtaining control of the money paid is said to sign merely for conformity. But again, any negligence on the part of a trustee joining in the receipt for conformity, in leaving the trust money under the sole control of the trustee receiving it, may make him responsible for any loss incurred through a breach of trust committed by the latter. It is the duty of the trustee to see that all trust funds are, as soon as possible, invested in the joint names of the trustees, and placed in the bank in their joint names; and if they neglect this duty they are liable for the consequences (*a*).

In two other cases a trustee may be responsible for the acts of his co-trustee. First, where he hands over trust money in his possession to his co-trustee, without securing

(*z*) Trustee Act, 1893, s. 17 (3).

(*a*) *Per* KAY, J., in *Re Flower and Metropolitan Board of Works* (1884), 27 Ch. D. 592, at p. 596.

its due application, and, second, where he becomes aware of a breach of trust either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress (*b*).

In all these cases, however, the trustee may be relieved of liability for his co-trustee's acts by the terms of the trust instrument (*b*).

4. Extent of Liability.—A trustee is civilly liable for every breach of trust committed by him, and he may also be liable criminally. We shall deal first with his civil liability.

Stated generally, when a trustee is guilty of a breach of trust his liability amounts to this—that he must make good the loss which the trust estate has thereby suffered. To this the legislature has made one exception, and it is largely qualified by the rights given to the *cestui que trust*.

The statutory exception is this. Where the breach of trust consists merely in advancing too much trust money on a mortgage security, which was otherwise a proper security, then, in case of loss, the trustee is liable only for the excess advanced, over the amount for which the mortgage would have been a proper security (*c*).

The qualifications due to the rights of *cestuis que trustent* may be summed up in this way. Where the breach consists in improperly selling trust property, the *cestui que trust*, if absolute owner and *sui juris*, may either adopt the sale and claim the purchase money, or repudiate the sale and claim for breach of trust. Where it consists of improper investment of trust property, he may, in the same way, adopt the investment and claim the securities, or repudiate the investment and claim for breach of trust. Where there are two investments, both of which are

(*b*) *Per* Lord WESTBURY in *Wilkins* v. *Hogg* (1861), 31 L. J. Ch. 41

(*c*) Trustee Act, 1893, s. 9.

improper, and one of which produces profit and the other loss, the *cestui que trust* may adopt the one which produces profit, and claim in respect of the other for breach of trust.

When the *cestui que trust* chooses to proceed for breach of trust, his claim varies accordingly as the trustee has used the trust money for his own purposes or not. If he has not used the trust money for his own purposes, all that the *cestui que trust* can recover is the *corpus* of the money misapplied, with any interest which has in fact accrued on it. Where, however, the trust money was used for the trustee's private benefit, the *cestui que trust* is entitled to the restoration of the trust money with interest at the rate of three per cent., or, if the money was used by the trustee in trade or in speculative investments, at five per cent. per annum (*d*) ; or, in the alternative, with the profits actually earned.

The criminal liability of a trustee depends on section 80 of the Larceny Act, 1861. By that section, it is enacted, that a trustee who, with intent to defraud, shall convert or appropriate the trust property to his own use, or for the use of any person other than the *cestui que trust*, or otherwise dispose of or destroy it, shall be guilty of a misdemeanour, and, on being convicted, shall be liable to a maximum punishment of seven years penal servitude. But criminal proceedings are not to be taken without the sanction of the attorney or solicitor-general, or, if civil proceedings have taken place, of the judge of the court wherein those proceedings were heard. This criminal remedy does not affect the rights of the *cestui que trust* in law or equity (s. 81).

Extraordinary Rights of the Cestui que Trust.—Besides the rights already indicated of the *cestui que trust*, there are two others of a more or less extraordinary nature, which may now be mentioned. The first is the right

(*d*) *Re Davis, Davis* v. *Davis*, [1902] 2 Ch. 314.

against strangers meddling in the trust affairs. Where a stranger is knowingly a party to a breach of trust, he becomes a constructive trustee, and as such is subject to precisely the same obligations and liabilities as an express trustee. In the second place, a *cestui que trust* is entitled, not merely as against the trustee, but also as against the trustee's creditors, to "follow the trust property." By this phrase is meant, that the *cestui que trust* is entitled to claim as his own property any investment, into which it can be shown that the trustee had put trust money, in breach of trust.

This right of following the trust funds should be remembered in connection with a further doctrine. Where a trustee pays trust money into his private account at a bank, and afterwards draws cheques on that account, it is presumed by equity that he intended first to draw out his own money, and not the trust money. Accordingly, the balance remaining to the account is treated as trust money (*e*).

Relief of Trustee.—Parliament has now provided relief for a non-fraudulent trustee in three ways.

(1) By way of limitation of action. In all cases, except (a) where the breach of trust is fraudulent, (b) where the trust funds are still in the hands of the trustee, (c) where the trust funds have been converted by the trustee to his own use,—the trustee may, after six years from the breach, plead the lapse of time as a bar to an action based on it. Time runs for this purpose against a married woman without power of anticipation, but not against a *cestui que trust* until his interest vests in possession (*f*). Accordingly, a trustee remains liable to an action, not merely for six years after a breach of trust, but until six years after the interest of the last *cestui que trust* taking by purchase under the settlement has vested in possession. But a

(*e*) *Re Hallett, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696.

(*f*) Trustee Act, 1888, s. 8; *Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 176.

cestui que trust whose right of action is barred, is prohibited from taking any benefit under an action brought by one whose right is not barred.

(2) By way of indemnity. Where the trustee committed the breach of trust at the instigation or request, or with the consent in writing, of a *cestui que trust*, the court may, if it thinks fit, impound the interest of the *cestui que trust* in question, or any part of it, by way of indemnity to the trustee, even though the *cestui que trust* is a married woman entitled for her separate use without power of anticipation (*g*).

(3) By way of excuse. If the court is of opinion that the trustee liable for the breach of trust acted honourably and reasonably, and that he may fairly be excused, it may relieve him wholly or partially from personal responsibility for the same (*h*).

(*g*) Trustee Act, 1893, s. 45.

(*h*) Judicial Trustees Act, 1896, s. 3.

CHAPTER XI.

OF EQUITIES ARISING FROM CONSTRUCTIVE CONFIDENCE.

THE equities which arise from constructive confidence, that is, where there is no express confidence or undertaking to raise them, may for present purposes be summed up under three heads: (1) Mortgages; (2) Contracts for sale of land; (3) Equitable charges and assignments.

All of these have been referred to incidentally in the earlier parts of the Commentaries, while the first two have been discussed in detail (*a*). It would be mere repetition, therefore, to set out here the relative rights and duties of the mortgagor and mortgagee, or the vendor and purchaser of land. Besides, we are now considering, not the subject-matter of the jurisdiction of equity, but rather the influence and effect of equitable principles on the law; and, as we have seen, many of those rights and duties now depend neither on equitable principles, nor even on common law principles, but on statutory enactment (*b*). We therefore will give here merely a sketch of the equitable view of these relations.

(1) *Mortgages.*—The primary and most radical difference in the common law and equitable view of a mortgage was this. A transaction by way of mortgage was at common law a conditional sale; a transaction by way of mortgage was, in equity, a mere security for a loan. If A. transferred his land to B. on condition that if A. paid a certain sum to B. on a certain day, B. should retransfer it to A., the common law said that this tranaction made B. the owner, subject to a condition to retransfer to A. on the

(*a*) *Supra*, vol. I., pp. 175—179, 422—424; *ib.*, 430—433.

(*b*) *Supra*, pp. 457—459.

payment on that day of that sum. Accordingly, if A. failed so to pay, B. became absolute owner. On such a transaction, on the other hand, equity examined what the real intention of the parties was. If their intention really was that the transaction should be a conditional sale, then it took the same view of it as did the common law. But if on examination it was shown, that the real intention was, not to sell the land to B. subject to a right in A. to re-purchase it at a certain price and time, but only to hand over the land to B. as a security for the repayment of a loan with interest, then equity held that all that B. was entitled to was, the repayment of this loan with interest. A., in its view, remained the real owner of the land after the legal transfer, and, subject to the right of the court to bar him from claiming a retransfer of the land from B., in case he neglected to repay him the loan within a reasonable time, B. was merely a trustee of the land for A. A.'s equitable estate in the land was called *his equity of redemption* (*c*).

Law and equity each carried out its own view of the nature of a mortgage very thoroughly. Thus, at law, the mortgagee was entitled to take possession at any moment of the mortgaged land. This, equity could not prevent, but if and when he did take possession of it, equity treated him as a trustee of it for the mortgagor. The latter was entitled to call on him for an account of all the rents and profits he had received, or but for his wilful negligence might have received ; and, when these amounted to the sum total of the mortgage debt and interest due, he had to reconvey to the mortgagor. On the other hand, the mortgagor, as long as he was left in possession of the land, was under no obligation to account to the mortgagee for the rents and profits received by him, nor would the court interfere with his management of the land, save where he was committing acts of waste which tended to render the land an insufficient security for the debt and interest.

Again, as the common law regarded the mortgagee as

(*c*) *Casburne* v. *Inglis* (1737), West, *temp.* Hardw. 221 ; 2 W. & T. 6.

the owner, on his death the legal title to the mortgaged land vested in his real representatives, if his estate were a heritable freehold, and in his personal representatives if it were a leasehold. In equity, on the other hand, his interest being regarded only as a debt, the right to it always vested in his personal representatives. The result of this was, that where the mortgaged land was a heritable freehold, the right to receive the mortgage money was on the death of the mortgagee intestate, in the mortgagee's administrators, while the only person who, on redemption of the mortgage, could reconvey the legal estate, was the mortgagee's heir-at-law. This led to much inconvenience, and to remedy it, section 30 of the Conveyancing Act, 1881, which applies equally to trust and mortgage estates, and which has already been referred to (*d*), was passed ; and now the mortgaged estate, on the mortgagee's death, always vest in his personal representatives. The equity of redemption being the equitable ownership of the land, always vested as the legal estate would have done had it not been mortgaged.

The equity of redemption, like every other equitable estate, can be settled, devised, sold or mortgaged. Of course, every mortgage of the equity of redemption is only an equitable mortgage, since the mortgagor has only an equitable estate to dispose of. Such mortgages—called *puisne* mortgages—confer the right upon the person entitled to them of redeeming the prior mortgages, and so turning the mortgage into a legal one.

Another doctrine which depends on the equitable view that a mortgage is a loan, is what is known as the doctrine against *clogging the redemption*. By clogging the redemption is meant, the entering into an agreement, either in the mortgage deed itself, or contemporaneously with it, for the purpose of preventing or hindering the mortgagor from getting back his land, or getting it back completely, on his paying all the debt and interest. Thus, an agreement that

(*d*) *Supra*, vol. I. p. 178.

on failure to redeem at a given date, the right to do so shall determine, is a clog on the redemption, and therefore void. Again, an agreement giving the mortgagee rights over mortgaged land after the debt and interest are paid off, is also void (*e*). This doctrine turns largely on the further consideration, that the mortgagor and mortgagee do not deal on even terms, and that therefore the former is especially entitled to the protection of the court. This is also seen in the provision against clauses charging a higher rate of interest when the interest reserved is not paid punctually.

It may be added that equity, where necessary, also protects the mortgagee. Thus, where a mortgagor has let the interest on a mortgage debt run into arrears of more than six years, he will not be allowed in an action for redemption, to set up the Statute of Limitations (*f*). And a mortgagee who has taken possession is entitled, as against the mortgagor on a sale, to any enhanced value arising from improvements to the mortgaged land made by him at his own expense (*g*).

(2) *Contracts for Sale of Land.*—On the conclusion of a valid contract for the sale of land, either party to it is entitled to regard the equitable title to the land as passing at the date of the contract, and the equitable title to the rents and profits of the land as passing from the time fixed in the contract for completion, or if no such time be fixed, from the time when the title is or should have been accepted by the purchaser. From the time the purchaser's equitable title to the rents and profits arises, the vendor is entitled to interest on the purchase money.

It follows from this, that, on the completion of the contract, the purchaser must take the land subject to any damage it may have suffered since the date of the contract, while the

(*e*) *Rice* v. *Noakes & Co.*, [1902] A. C. 24.

(*f*) *Re Lloyd*, *Lloyd* v. *Lloyd*, [1903] 1 Ch. 385.

(*g*) *Henderson* v. *Astwood*, [1894] A. C. 150.

vendor must take reasonable care that no damage shall happen, or be liable for the consequences. All liability for outgoings rests on him who, for the time, is entitled to the rents and profits.

As between the representatives of a vendor or purchaser who dies before a valid contract for sale entered into by the deceased has been completed by conveyance, the contract converts the land, if realty, into personalty. On such death the purchaser's heir or devisee now takes the land, subject to liability for the purchase money unpaid at the purchaser's death (*h*).

(3) *Equitable Charges and Assignments.*—At common law, the general rule was, that no charge could be imposed on property in any other way than by an instrument capable of transferring the legal title to the property, and that certain kinds of property, and more especially choses in action and property in which the intended assignor had no interest at the time of assignment, could not be transferred at all. On both of these points equity differed largely from the common law.

While at common law no charge on land could be created by anything but a transfer of the title, by the proper instrument or proceeding—in other words, by a feoffment, or, in later times, by a deed of conveyance or lease—equity, on the other hand, not merely allowed to be created, but created itself, charges on land without any instrument, where the owner of the land had received value for the charge. Where the charge was created by equity, independently of agreement between the parties, it was usually called a *lien;* but in its nature a lien is the same as an equitable charge strictly so called.

Examples of equitable charges created by agreement of the parties are very numerous. Thus, a mortgage of lands may be created by the owner depositing his title deeds with the lender as security for a loan, or by his

(*h*) Real Estate Charges Acts, 1854, 1867, and 1877.

signing an agreement to deposit them. This is usually called an equitable mortgage by deposit. Again, an agreement in writing to create a legal charge will create an equitable one. The most common examples of equitable liens are the liens which vendors who have conveyed land to purchasers, without receiving all the purchase money, have on the land sold for the unpaid purchase money, and the liens which purchasers who have contracted to sell land, and advanced part of the purchase money before conveyance, have on the land contracted to be sold, for the purchase money so advanced. These liens are not to be confused with common law liens, which consist of the right of persons having possession of property to retain possession of it till certain charges upon it are paid.

The holders of all equitable charges, like the owners of other equitable interests, are liable to be postponed to persons who have acquired the legal estate in the land for value without notice of their charges. Otherwise their rights are much the same as those of legal mortgagees, except that they have no right to foreclose (*i*).

As to equitable assignments of property belonging to the assignor, the equitable rule now is, that equity permits any property to be assigned, except where it is made unassignable by a settlement on a married woman, or by special statute, or by the policy of the law, as being contrary to the public interest. Most choses in action have now been made assignable at law, and so this part of the subject has lost most of its interest. There is this difference, however, between the assignment in law and in equity of a chose in action. In law, the assignee steps into the shoes of the assignor, and is entitled to take proceedings in his own name to reduce the chose into possession. If the assignment is equitable merely, then the assignee only becomes entitled to take proceedings in the name of the assignor. And a further difference is

(*i*) See Ashburner, *Equity*, p. 342.

that, where a chose in action is assignable in law, on an assignment of it the assignee takes it absolutely, but where it is only assignable in equity, he takes subject to all equities arising out of the relations between the assignee and the person liable on the chose in action. The Judicature Act, 1873 (s. 25 (6)), which makes debts and choses in action assignable at law by writing, retains this equitable characteristic.

As to assignments of property in which, at the time of assignment, the assignor has no property, the law permitted nothing further than a contract undertaking to assign it when it came into possession. If the assignor failed to assign when the property came into his possession, all the assignee could do was to sue him for breach of contract. Such a contract, however, is, in equity, an assignment of the property itself from the time the property comes into possession; and the assignor becomes a trustee of it for the assignee.

CHAPTER XII.

OF RECIPROCAL EQUITIES.

Most of the subjects that, in a treatise on Equity, would come into this division have, like those properly coming within the last division, been already treated of in the preceding parts of these Commentaries. We will, therefore, consider here only such as have been either not hitherto discussed, or not hitherto discussed sufficiently, and which illustrate especially equitable principles, as opposed to those subjects which, though usually regarded as within the jurisdiction of equity, are only within it by virtue of the fact that the machinery of equity courts is better fitted to deal with them than that of courts of common law.

I. *A Wife's Equity to a Settlement.*—Before the Married Women's Property Act, 1882, the whole law giving married women proprietary rights was (save for the Married Women's Property Act, 1870) the creation of equity. The common law refused to married women the capacity to hold property or to dispose of it. Equity, however, recognised no such incapacity. It conferred on married women the same capacity to hold and dispose of property of every kind as the common law conferred on men and *femes soles*. One difference, however, it allowed (though only in comparatively recent times) as regards disposition. It permitted property to be settled in trust for a married woman, without power of alienation on her part during the coverture. This was altogether contrary to the general principle of equity, which was to remove the common law difficulties in the way of free alienation ; but it was based on another principle, which, as we have seen, was freely applied as

between mortgagor and mortgagee, namely, the duty of equity to protect the weaker party. *The restraint on anticipation*, as the restraint on alienation is usually called, was, in the language of Lord Brougham, recognised to prevent the husband acquiring the wife's property "by kicks or kisses."

The general subject of married women's property has, however, been already discussed (*a*); and the only matter which properly comes within our present division is one which is becoming every day of less and less importance, namely, a wife's equity to a settlement. When this doctrine arose, a husband was absolutely entitled at law to all the personal property accruing to his wife. Where such property accrued to her directly, that is, where the legal estate vested in her husband in her right, equity could not interfere. But where it was necessary, in order to obtain possession of the property, to apply to a court of equity, such court, on the application of the wife, would, on the principle that he who demands equity must do equity, direct the husband to settle a certain proportion of the funds claimed, for the benefit of the wife and children, before handing over any to the husband. Generally speaking, realty, whether the wife's interest was legal or equitable, and life interests in personalty, were not the subjects of equities to settlements. The whole matter, however, is now rather ancient history, since the Married Women's Property Act, 1882, has made the doctrine obsolete, save as to property the title to which accrued before 1883 to women married before that date.

II. *Administration of a Deceased Person's Estate.*—Again, this subject has already been considered (*b*). In referring to it now, we can only deal with the points which are especially affected by the principles of equity. These are first, Election; secondly, Satisfaction; and thirdly, Performance. In each of these cases, equity endeavours to

(*a*) *Supra*, vol. II. pp. 308—325. (*b*) *Supra*, vol. II. pp. 249—259.

prevent anyone obtaining more than the testator intended he should receive—whether with advantage to justice or not is a matter of private opinion.

Election.—By election is meant the choice which equity compels, when a donor gives property to a donee, and at the same time, and by the same instrument, gives the donee's property to some one else. Here the donee is put to his election—that is, if he desires to take the property proffered, he must transfer the property of his own which the instrument professes to give to another person. The law upon this question may be summed up in the following propositions :—(1) To raise any question of election there must be a gift of the donor's property to the donee. (2) There must also be an attempted gift of the donee's property by the donor to a stranger. (3) The knowledge or want of knowledge of the donor that the property he attempts to transfer (by will or deed) is the donee's, is immaterial. (4) If the donee chooses to elect against the instrument of gift—that is, to keep his own property—the rule is not, that the donee should forfeit all his interest in the gift, but that the person to whom the donee's property was left shall receive compensation.

Satisfaction.—Satisfaction is ordinarily defined as the making of a gift, with the express or implied intention that the gift should be taken as an extinguishment of some claim, whether legally binding or not upon the donor. It is always a question of fact whether a gift is or is not in satisfaction ; and, in the case of gifts by will, extrinsic evidence is admissible to show what was the motive of the gift (*c*).

We will consider the subject under four heads.

(a) Satisfaction of Debts by Legacies.—This is the subject of two conflicting maxims. The first is, that a legacy imports a bounty ; and therefore that a legacy should not

(*c*) *Hall* v. *Hill* (1841), 1 Dr. & W. 94, at p. 132.

be regarded as a satisfaction of a debt of the testator. The second is, that a debtor is not presumed to give, but to pay; and therefore a legacy is to be regarded as a satisfaction of a debt, where there appears to be no reason to hold the contrary. Reconciling as far as possible these principles, it has been held as follows:—(a) That a legacy of a smaller amount than that owed by the deceased testator to the legatee is not a satisfaction of the debt. (b) That where the legacy is given for a particular purpose, or from an expressed particular motive, there is no satisfaction. (c) That where the legacy and the debt are of different characters, *e.g.*, the debt a lump sum and the legacy an annuity, this cannot be held a satisfaction. (d) That where at the time the will was made there was no debt due by the legatee to the testator, the legacy cannot be a satisfaction. (e) That where the debt and the legacy were payable at different times or under different circumstances the legacy is not in satisfaction. (f) That where the legacy is by way of residue, it being of uncertain value, it cannot be in satisfaction. (g) That where there is an express direction to pay debts and legacies, the legacy given is not a satisfaction of the debt.

(b) Satisfaction of Legacies by Legacies.—This is usually treated as a doctrine of equity, but really it is purely a matter of construction. Whether a legacy is intended to be substituted for another legacy must of course depend, not upon any principle of equity, but on the intention of the testator. The presumption, however, is that two legacies of the same amount, given in the same will, to the same person, are not intended to be separate, but to be the same gift. If, however, the gifts are of unequal value, or are in different wills, the presumption is that they are separate gifts and therefore accumulative.

(c) Satisfaction of Legacies by Portions.—There is a presumption of law, that a parent or one *in loco parentis* does not intend to give what are called double portions—that

is, a double share in his estate—to any child or adopted child. Accordingly, where by his will such a person has given to a child or adopted child a legacy, and afterwards he, on such child's marriage, or on some other occasion, gives a portion to the child, this will be considered a satisfaction of the legacy until the contrary is shown (*d*). It is hardly necessary to point out the great premium this rule puts upon fraud and perjury.

(d) Satisfaction of Portions by Legacies.—The rule here is much the same as in the case of satisfaction of legacies by portions. There is only this difference, that, where a child is entitled to a portion, no act of its parent can deprive it of the right of electing whether it will take the legacy or the portion.

III. *Performance.*—The distinction between satisfaction and performance is somewhat thin. As far as there is any real distinction it is this: Satisfaction is the fulfilment of an obligation legal or voluntary; Performance is the carrying out of a contract legally binding upon the donor. The matters which most commonly arise in respect to Performance may be arranged under three heads:—

(a) Covenant to settle land belonging to the covenantor. When the owner of land enters into a binding covenant to settle it, this covenant constitutes a lien on the land, which lien is binding on subsequent purchasers with notice, and also on the covenantor's creditors and trustee in bankruptcy.

(b) Covenant to settle land not yet belonging to the covenantor. Where this covenant is to buy and settle specified land, a purchase of the land in question will be regarded as a performance, and there will immediately on such purchase arise a lien in respect of the covenant. Where, however, the covenant refers, not to specified land,

(*d*) See *Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1.

but merely to land of a given value, or kind, then the purchase of land of the kind covenanted to be settled will be regarded as a performance of the covenant, though no lien will attach to the land purchased.

(c) Covenant to leave property by will. Where a person enters into a covenant to leave by will property to a certain value, such covenant will be regarded as performed, if the covenantee receives in any way property of the value in consequence of the death of the covenantor. Thus, if the covenantor dies intestate, and the covenantee receives, as widow or next-of-kin, property of the value agreed to be bequeathed, this will constitute a performance of the covenant. Even if the property so received is of less value, that will be a performance *pro tanto* of such covenant.

A covenant to leave property does not in any way interfere with the right of the covenantor to deal as he likes with his property during his life. He may use it or give it away as he thinks proper ; the only test of the validity of his acts is, whether or not they were *bonâ fide*.

CHAPTER XIII.

OF THE LIMITATION OF ACTIONS.

THE Statutes of Limitation have for their object to preserve the peace of the kingdom (*interest reipublicæ, ut sit finis litium*), and to prevent those innumerable perjuries which might ensue, if a man were allowed, at any distance of time, to bring his action for an injury committed (*a*). It is to be remembered also, that a supine claimant is entitled to no favour or protection from the law ; for *leges vigilantibus, non dormientibus, subveniunt.*

The course of legislation upon the subject under consideration obliges us to treat separately (1) the statutory limitations which are applicable to land ; and (2) the statutory limitations which are applicable to things other than land.

I. *The Statutes of Limitation as applicable to Land.*— It was with reference to *real* actions, that the law of limitations was first established ; and, originally, such actions were limited from some particular event, or fixed era. For, by the antient law in the time of Henry the Second, the demandant in a writ of right could not claim upon any seisin earlier than the reign of Henry the First, and afterwards, by the Statute of Merton, (20 Hen. III. c. 8,) he could not claim upon any seisin earlier than the reign of Henry the Second, and, by the Statute of Westminster the First, (3 Edw. I.) c. 39, upon any seisin earlier than the reign of Richard the First (*b*). And the same species of limitation, though from more recent dates, was

(*a*) 3 Bl. Com. 308.

(*b*) Com. Dig. *Temps.* (G).

from time to time appointed for many other kinds of real action. But these dates, in process of time, became in effect no limitation at all, which gave rise at length to the Statute of Limitations, 32 Hen. VIII. (1540) c. 2, whereby the limit of *thirty* years, if the demandant claimed on his own seisin, and of *fifty* (or, in some cases, *sixty*) years, if he claimed on the seisin of his ancestor, was fixed for real actions (*c*); and afterwards, by the Limitation Act, 1623, section 1, for *possessory* actions, it was enacted, that no person should make *entry* into any lands or hereditaments, but within twenty years after his right of entry should have first accrued.

And thus stood the doctrine of limitation in general, so far as related to real property, from the dates of these statutes respectively till the reign of William the Fourth, when, in the year 1833, the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), was passed, the provisions of which, as amended by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), are the provisions now in force, and will be presently stated. But before proceeding to them, it is convenient to mention, that there originally existed no statute of limitations that was applicable to *claims by the Crown*, the maxim being *nullum tempus occurrit regi*, and the 32 Hen. VIII. c. 2 not having been so framed as to bind the Crown's rights; and although by the Limitation Act, 1623, the sixty years next precedent to the 19th February, 1623 was the period of limitation fixed for Crown claims (*d*), that limitation soon became ineffectual by the efflux of time. It was,

(*c*) This statute extended also to *rents*, *suits*, and *services*, but only to those which were incidents of tenure, and not to those created by deed, or reserved on a particular estate, or on copyhold grants; and it did not extend to *casual* services such as by possibility might not become due within the period of limitation (Com. Dig. *Temps.* (G), 9; *Hollins* v. *Verney* (1883), 11 Q. B. D. 715; 13 Q. B. D. 304).

(*d*) 3 Inst. 189; and see also 21 Jac. I. (1623), c. 14, as regards *informations of intrusion*, where the Crown has been out of possession for twenty years.

however, at length provided, by the Crown Suits Act, 1769, that, in suits relating to land, the Crown should be bound by the lapse of sixty years ; and by that statute, as amended in certain points by the Crown Suits Act, 1861, the law relating to this subject is still governed.

Up to the reign of William the Fourth there was no limitation with regard to the time within which actions concerning *advowsons* were to be brought, at least none later than the times of Richard the First and Henry the Third ; for, by the 1 Mar. (1554), sess. 2, c. 5, the 32 Hen. VIII. c. 2, was declared not to extend to any writ of right of advowson, or writ of *quare impedit*, or assize of darrein presentment, or writ of *jus patronatûs* (*e*), the reason having been, because the title to an advowson might not come in question within the period of sixty years. For instances are not wanting of two successive incumbencies having continued for upwards of a hundred years (*f*).

The opinion having become prevalent, that *twenty* years was a reasonably sufficient time in every case for the recovery of corporeal hereditaments, unless where the claimant laboured under some disability, this opinion was carried into effect by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27) (*g*) ; but it having since been considered, that even that space of time is more than enough, the period of *twelve* years has been established by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). By force of these two Acts, and of the amending Real Property Limitation Act, 1837 (7 Will. IV. and 1 Vict. c. 28), the law on the subject is now as follows (*h*) :

(1) No entry or distress upon, or action to recover,

(*e*) See also 7 Ann. (1708), c. 18.

(*f*) 3 Bl. Com. 251.

(*g*) *Grant* v. *Ellis* (1841), 9 M. & W. 113 ; *Owen* v. *De Beauvoir* (1847), 16 M. & W. 547 ; *Howitt* v. *Harrington*, [1893] 2 Ch. 497.

(*h*) The Act of 1833 came into force on the 1st January, 1834 ; and the Act of 1874 came into force on the 1st January, 1879.

any land or rent (*i*), can be brought (otherwise than by the Crown), unless within *twelve* years next after the time at which the right to make the entry or distress, or to bring the action, shall have *first accrued* to the person making or bringing the same (*k*); it being provided, however, that if, at the time at which the right of any person shall *first accrue*, such person shall be under the disability of infancy, coverture, idiocy, lunacy, or unsoundness of mind (*l*), then he (or the person claiming through him) may enter, distrain, or sue within the six years next after the person to whom the right accrued shall have died, or ceased to be under disability, whichever event shall first happen (*m*). But no such right of entry, distress, or action, may be exercised, except within *thirty* years next after the right accrues, even though the disability may have attached during the whole of the thirty years, or although the term of six years above mentioned shall not have yet expired (*n*). And, it being necessary to define with exactness the time at which the right of entry shall have *first* accrued, the Real Property Limitation Act, 1833, sections 3—9, and the Real Property Limitation Act, 1874, section 2, have (by their combined effect) provided, that, in the following cases, the right of entry shall be deemed to have first accrued as follows:—In the case of a person in possession, on his dispossession (*o*); in the case of an heir or devisee entitled to the possession, on

(*i*) "Rent" extends to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged on land, other than moduses or compositions belonging to a spiritual or eleemosynary corporation sole (*Irish Land Commission* v. *Grant* (1884), L. R. 10 App. Ca. 14; *Skene* v. *Cook*, [1902] 1 K. B. 682).

(*k*) Act of 1833, s. 2; and Act of 1874, s. 1.

(*l*) Prior to the Act of 1874, s. 4, *absence beyond seas* used also to be a disability; coverture cannot (since the Married Women's Property Act, 1882) be regarded as a disability.

(*m*) Sect. 3; *Borrows* v. *Ellison* (1871), L. R. 6 Exch. 128.

(*n*) Act of 1874, s. 5.

(*o*) *Littledale* v. *Liverpool College*, [1900] 1 Ch. 19.

the death of his testator or ancestor who has died in possession ; in the case of a grantee by deed in possession, on the execution of the deed ; in the case of remaindermen and reversioners, and persons entitled to other future estates, on their remainders, reversions, or other future estates falling into possession (*p*) ; and in the case of remaindermen and others becoming entitled to possession by reason of any forfeiture or breach of condition, on the occurring of such forfeiture, or on the breach of such condition, or (but in the case of remaindermen and reversioners only) at the time when their remainders or reversions would have fallen into possession if there had been no such forfeiture or breach of condition (*q*). But as regards all remainders, reversions, and future estates, expectant on a particular estate (*p*), the owner of which particular estate shall have been, and until the determination thereof continued to be, dispossessed, the right of entry will be wholly barred, either at the expiration of twelve years from the dispossession of the particular estate, or at the expiration of six years from its determination, whichever is the longest (*r*). At which time also will be barred all titles created subsequently to such dispossession of the particular estate, out of or in the remainders or reversions thereon (*s*).

(2) As regards tenancies in tail, when the right of entry of a tenant in tail is barred, all estates which he had

(*p*) *Walker* v. *Yalden*, [1902] 2 K. B. 304.

(*q*) *Sturgis* v. *Darell* (1859), 4 H. & N. 622.

(*r*) *Pedder* v. *Hunt* (1887), 18 Q. B. D. 565 ; *White* v. *Earl of Devon*, [1896] 2 Ch. 562.

(*s*) In the case of reversions on tenancies at will, the right of entry first accrues on the determination of the will, or (at the latest) on the expiration of one year from the commencement of the tenancy (cf. *Jarman* v. *Hale*, [1899] 1 Q. B. 994) ; and in the case of reversions on tenancies from year to year (not being by lease in writing), at the end of the first year, or (at the latest) on the last payment of rent (*White* v. *Earl of Devon*, *supra*) ; and in the case of reversions on leases in writing (reserving 20*s*. or more of annual rent), on such rent being received adversely by a person wrongfully claiming such reversion.

power to bar are also barred; and when a tenant in tail dies before his right of entry is barred, the right of entry in respect of all estates which he had power to bar, will be barred on the expiration of the period which would have barred the tenant in tail himself if he had so long lived. Moreover, a person in possession under a base fee created by any tenant in tail, will, after twelve years from the time when such tenant in tail might (without the consent of any other person) have created a fee simple absolute, acquire the fee simple absolute; unless in the meantime the person entitled to the remainder or other future estate has recovered the possession (*t*).

(3) As regards proceedings in *equity*, no person claiming any land or rent in *equity*, may bring proceedings to recover the same, but within the period during which he might have entered, distrained, or brought an action for the recovery thereof, if his estate had been legal instead of equitable (*u*). But, as regards land or rent vested in any trustee upon an express trust, the right of the *cestui que trust* (or any one claiming through him) to sue first accrues, when the land or rent has been conveyed to a purchaser for a valuable consideration (*x*); and the right to sue the trustee himself will never be barred, if the trustee has been guilty of a fraudulent breach of trust, or if he retains the property which is the subject of the action, or its proceeds, or if he has converted the same to his own use (*y*). As regards cases of concealed fraud, the right to sue accrues when the fraud was (or, with reasonable diligence, might have been) first known or discovered by the person injured (*z*), but not so as to

(*t*) Act of 1833, ss. 21—23; Act of 1874, s. 6; *Austin* v. *Llewellyn* (1853), 9 Exch. 276; *Dawkins* v. *Lord Penrhyn* (1877), 6 Ch. D. 318.

(*u*) Act of 1833, s. 24.

(*x*) Sect. 25.

(*y*) Trustee Act, 1888, s. 8; *How* v. *Earl Winterton*, [1896] 2 Ch. 626.

(*z*) *In re McCallum*, [1901] 1 Ch. 143; *Gibbs* v. *Guild* (1882), 8 Q. B. D. 296; 9 Q. B. D. 59.

enable the owner of the land or rent to sue any *bonâ fide* purchaser, who did not assist in the commission of the fraud, and who (at the time of his purchase) did not know, and had no reason to believe, that the fraud was being committed (*a*). And nothing in the Acts contained will interfere with any rule of equity refusing relief (on the ground of *acquiescence* or otherwise) to any person whose right to bring the suit may *not* be barred by virtue of the statute (*b*). As regards mortgaged estates, when the mortgagee obtains the possession, the mortgagor (or any person claiming through him) may not take proceedings to redeem the mortgage, except within twelve years next after the time at which the mortgagee obtained the possession (*c*), unless the mortgagee shall in the meantime by writing under his hand have acknowledged the mortgagor's title or his right of redemption; which written acknowledgment may be given either to the mortgagor (or to some person claiming his estate) or to his agent (*d*). And, as between mortgagors and mortgagees, no extension of time is allowed for disabilities (*e*).

(4) No action or other proceeding may be brought to recover any money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, except within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same; unless part of the principal money shall have been paid, or an acknowledgment

(*a*) Act of 1833, s. 26; *Chetham* v. *Hoare* (1870), L. R. 9 Eq. 571; *Vane* v. *Vane* (1873), L. R. 8 Ch. 383.

(*b*) Sect. 27; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286; *Blake* v. *Gale* (1885), 31 Ch. D. 196.

(*c*) *Thornton* v. *France*, [1897] 2 Q. B. 143.

(*d*) Act of 1837; Act of 1874, s. 7.

(*e*) *Kinsman* v. *Rouse* (1881), 17 Ch. D. 104; *Forster* v. *Patterson*, *ib.* 132; *Adnam* v. *Earl of Sandwich* (1877), 2 Q. B. D. 485; *Heath* v. *Pugh* (1881), 6 Q. B. D. 345; *Sands* to *Thompson* (1883), 22 Ch. D. 614; *Newbould* v. *Smith* (1885), 29 Ch. D. 882.

in writing given signed by the person by whom the same is payable or his agent (*f*); and then only within twelve years after such payment or acknowledgment (*g*). And as regards such charges on land, although the same should be secured by an express trust, the time is not to be enlarged (*h*).

(5) No *arrears* of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of any such arrears of rent or interest, will be recoverable, but within *six* years after the same shall have become due, or been acknowledged in writing to the person entitled thereto or his agent; excepting that where a prior mortgagee, within one year next before action, has been in possession, the second mortgagee may in his action recover the arrears of his interest for the whole period (although exceeding six years) that the prior mortgagee has been in possession (*i*).

(6) As regards claims by a spiritual or eleemosynary corporation sole, the period of limitation for the recovery of any land or rent is the period during which two persons in succession shall have held the office or benefice in respect whereof the land or rent is claimed, together with six years after a third person shall have been appointed thereto, if the times of such two incumbencies and six years (taken together) shall amount to the full

(*f*) *In re Viscount Clifden*, [1900] 1 Ch. 774; *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430; *Kirkland* v. *Peatfield*, [1903] 1 K. B. 756.

(*g*) Act of 1874, s. 8; *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, 189; *Barnes* v. *Glenton*, [1899] 1 Q. B. 885. The part payment must be one from which an acknowledgment of liability, and a promise to pay the residue, can be implied (*Taylor* v. *Hollard*, [1902] 1 K. B. 676).

(*h*) Act of 1874, s. 10; *Warburton* v. *Stephens* (1889), 43 Ch. D. 39; *In re Owen*, [1894] 3 Ch. 220.

(*i*) Act of 1833, s. 42; *Edmunds* v. *Waugh* (1866), L. R. 1 Eq. 418; *Ex parte Clarke* (1867), L. R. 3 Eq. 313; *Coope* v. *Cresswell* (1866), L. R. 2 Ch. 112; *Marshfield* v. *Hutchings* (1887), 34 Ch. D. 721.

period of *sixty* years; and if not, then during such further number of years as will make up the sixty years (*k*).

(7) As regards patrons seeking to recover rights of advowson or of presentation, the period of limitation is the period during which three clerks in succession shall have held the living, all having obtained possession thereof adversely to the right of the plaintiff; but if such three incumbencies taken together shall not amount to the full period of sixty years, then sixty years is appointed as the period of limitation (*l*). On the other hand, if the three incumbencies should exceed one hundred years, then the plaintiff's right to sue is at once barred on the expiration of one hundred years, unless, of course, the adverse possession shall, in the meantime, have been interrupted (*m*).

(8) As regards land, the title to which has been registered under the Land Transfer Act, 1897 (*n*), adverse possession has ceased to be a mode of acquiring title to land (s. 12); but when the registration is for a *possessory* title only, and the adverse possession had already commenced at the date of the first registration of the title, that adverse possession does not cease to continue, but may afterwards mature, equally as if the title were not registered at all. And, even when the first registration was for an *absolute* title, such adverse possession so commenced as aforesaid will continue and may mature, so as to confer a title as against anyone other than and except a purchaser

(*k*) Act of 1833, s. 29; and regarding the time within which the Ecclesiastical Commissioners for England may (as successors of the estates of ecclesiastical corporations) sue for the recovery of land, see *Ecclesiastical Commissioners* v. *Rowe* (1880), L. R. 5 App. Ca. 736; and the Ecclesiastical Commissioners Act, 1840, therein cited.

(*l*) Sect. 30.

(*m*) Sect. 33. The periods thus limited as above, for enforcing a right to present to or bestow an ecclesiastical benefice, extend to the case where a bishop claims as *patron;* but the Act does not affect the right of any bishop to collate by reason of *lapse*. (See Limitation of Actions Act, 1843, s. 5.)

(*n*) 60 & 61 Vict. c. 65.

for value who has purchased under the registered proprietor, and who has also registered (s. 12).

II. *The Statutes of Limitation as Applicable to Things other than Land.*—(1.) The period of limitation, with respect to most personal actions, was fixed by the Limitation Act, 1623 (21 Jac. I. c. 16), s. 3 (*o*), whereby actions of trespass (other than trespass to the person), and of detinue, trover (*p*), and replevin : and actions for an account (other than between merchants) (*q*) ; and actions upon the case, except for verbal slander ; and actions of debt on simple contract, or for arrears of rent not due upon specialty (*r*), were limited to *six* years after the cause of action accrued. Actions of trespass to the person (*i.e.*, for assault, menace, battery, wounding, and imprisonment) are limited to *four* years ; and actions on the case for verbal slander are limited to *two* years. And these limitations still apply, there being the usual exceptions, of course, in favour of persons labouring under disability (*s*) ; for if the person entitled to sue should (when the cause of action accrues) be an infant or *non compos*, he may sue within the same period after the removal of the disability (*t*). But married women are not now under disability by reason merely of their coverture ; and *imprisonment*, or being *beyond the seas*, is no longer a disability (*u*) in a plaintiff ; although, as regards a defendant beyond the seas, the 4 & 5 Anne (1705), c. 3, section 12,

(*o*) *Collinge* v. *Heywood* (1839), 9 A. & E. 633 ; *Bonomi* v. *Backhouse* (1861), 9 H. L. C. 503 ; *Mitchell* v. *Darley Main Colliery Company* (1884), 14 Q. B. D. 125.

(*p*) *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206 ; *Spackman* v. *Foster* (1883), 11 Q. B. D. 99.

(*q*) This exception was repealed by the statute 19 & 20 Vict. c. 97, s. 9. *Cottam* v. *Partridge* (1842), 4 Man. & G. 271.

(*r*) 21 Jac. 1, c. 16, s. 3.

(*s*) Sect. 7.

(*t*) *Le Veux* v. *Berkeley* (1844), 5 Q. B. 836 ; *Townsend* v. *Deacon* (1849), 3 Exch. 706.

(*u*) Mercantile Law Amendment Act, 1856, s. 10 ; *Cornill* v. *Hudson* (1857), 8 E. & B. 429 ; *Pardo* v. *Bingham* (1869), L. R. 4 Ch. 735.

stays the running of the statute in his *favour* (*x*). As regards co-defendants, the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), section 11 has enacted, that where the cause of action lies against two or more joint debtors, the person entitled to sue, although entitled to an extension of time as against the one of them who is beyond the seas, shall not be entitled to any extension of time, against the other or others of them who were not beyond the seas when the cause of action accrued (*y*).

The operation of the statute of James, with respect to actions upon *simple contract*, was at one time considerably narrowed, by the doctrine which prevailed, that not only a payment on account of principal or interest, but any mere verbal acknowledgment made before action brought, to the effect that the debt was due, would suffice to take the case out of the statute, by raising an implied promise to pay the debt; upon which promise, (as upon a new cause of action,) the same time for instituting proceedings would again have been allowed as upon the original contract (*z*). But the law on this subject has been since materially altered. For, by the Statute of Frauds Amendment Act, 1828 (9 Geo. IV. c. 14, s. 1), it was enacted, that, in actions grounded upon any simple contract, no acknowledgment, or promise, should be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Limitation Act, 1623, unless such acknowledgment or promise was contained in some *writing*, containing or amounting to a promise to pay (*a*), signed by the party to be charged, or by his duly authorized

(*x*) By the Mercantile Law Amendment Act, 1856, s. 12, no part of the United Kingdom, Man, Guernsey, Jersey, Alderney, and Sark, nor the adjacent islands, being part of the dominions of his Majesty, is to be deemed "beyond seas" within the meaning of the 4 & 5 Ann. c. 3.

(*y*) *Towns* v. *Mead* (1855), 16 C. B. 123.

(*z*) *Bateman* v. *Pindar* (1842), 3 Q. B. 574; *Maber* v. *Maber* (1867), L. R. 2 Ex. 153.

(*a*) *Spong* v. *Wright* (1842), 9 M. & W. 629; *Hart* v. *Prendergast* (1845), 14 M. & W. 741; *Willins* v. *Smith* (1854), 4 El. &

agent (*b*) ; and that, where there were two or more joint contractors, no joint contractor should be chargeable, in respect only of the written acknowledgment of another. And, by the Mercantile Law Amendment Act, 1856, section 14 (*c*), it has been since provided, that no co-contractor or co-debtor shall lose the benefit of the limitation of the statute of James, by reason only of any payment by the other or others (*d*).

(2) The Limitation Act, 1623, was inapplicable to debts arising on instruments *under seal*, that is to say, to *specialty* debts ; but it became the practice, upon the trial of actions for specialty debts, for the judge to recommend the jury, where no payment on account of principal or interest had been made or demanded within twenty years, to presume that the specialty had been satisfied. And it was afterwards enacted, by the Civil Procedure Act, 1833, section 3, that all actions of debt for rent upon any indenture of demise, or of covenant, or of debt on any bond or other specialty, and all proceedings on recognizances, should be brought within *twenty years* after the cause of action or proceeding accrued ; and that all actions of debt upon an award, (where the submission was not under seal,) or for a copyhold fine, or for an escape, or for money levied upon any writ of *fieri facias*, should be brought within *six* years, it being, however, provided (as regards disabilities existing at the time of the accrual of the right of action), that the twenty years (or, as the case might be, the six

B. 180 ; *Cornforth* v. *Smithard* (1859), 5 H. & N. 13 ; *Tanner* v. *Smart* (1827), 6 B. & C. 603 ; *Lee* v. *Wilmot* (1866), L. R. 1 Ex. 364 ; *Chasemore* v. *Turner* (1875), L. R. 10 Q. B. 500 ; *Quincey* v. *Sharpe* (1876), 1 Ex. D. 72 ; *Skeet* v. *Lindsay* (1877), 2 Ex. D. 314 ; *Meyerhoff* v. *Froehlich* (1878), 3 C. P. D. 333 ; *Banner* v. *Berridge* (1881), 18 Ch. D. 254 ; *Sanders* v. *Sanders* (1881), 19 Ch. D. 373 ; *Curwen* v. *Milburn* (1889), 42 Ch. D. 424 ; *Green* v. *Humphreys* (1884), 26 Ch. D. 474 ; *Langrish* v. *Watts*, [1903] 1 K. B. 636.

(*b*) Mercantile Law Amendment Act, 1856, s. 13.

(*c*) *Jackson* v. *Woolley* (1858), 8 E. & B. 778 ; *Cockrill* v. *Sparkes* (1863), 1 H. & C. 699.

(*d*) *Cleare* v. *Jones* (1851), 20 L. J. Exch. 238 ; *Dick* v. *Fraser*, [1897] 2 Ch. 181 ; *Astbury* v. *Astbury*, [1898] 2 Ch. 111.

years), should reckon from the determination of the disability. And it was further provided by the Act (s. 5), that if any acknowledgment in writing (signed by the party liable or his agent) should have been given of the debt, or any payment made on account of it, the twenty years should again reckon from such acknowledgment or payment; but where there are several co-contractors or co-debtors, any payment on account by one of them will not now, as we have seen, prejudice the other or others (*e*).

(3) By the Law of Property Amendment Act, 1860, all proceedings to recover any share of the personal estate of an intestate, in the possession of his legal personal representative, must be brought within twenty years after a present right to receive the same has accrued. The same rule now applies to proceedings to recover the personalty of an intestate from the Crown (*f*).

(4) By the 31 Eliz. (1588), c. 5, all suits and indictments upon any *penal statute* must be prosecuted, where the forfeiture is to the Crown alone, within *two years* from the commission of the offence (*g*); and where the forfeiture is to a common informer alone, within *one* year (*h*);

(*e*) Mercantile Law Amendment Act, 1856, s. 14; *Astbury* v. *Astbury*, [1898] 2 Ch. 111. The twenty years has now (by construction of the courts) been reduced to twelve years, in the case of covenants in mortgage deeds (*Sutton* v. *Sutton* (1882), 22 Ch. D. 511); and in the case of bonds collateral to the mortgage entered into by the mortgagor (*Fearnside* v. *Flint* (1883), 22 Ch. D. 579); and in the case of judgments generally, whether charged on land or not (*Jay* v. *Johnstone*, [1893] 1 Q. B. 25, 189; *Bland* v. *Low*, [1894] 1 Ch. 147).

(*f*) Intestates Estates Act, 1884, s. 3.

(*g*) This statute extended also to all *informations* upon any penal statute; but so much of it as "relates to the time limited for "exhibiting an information for "a forfeiture upon any penal "statute" was repealed by the Summary Jurisdiction Act, 1848, s. 36, which Act, however, goes on to provide (s. 11), that all informations for offences punishable on summary conviction shall be laid within *six calendar months* from the time when the matter arose, unless the time for the information has been, as it usually is, otherwise specially limited (*Re Edmundson* (1851), 17 Q. B. 67).

(*h*) *Chance* v. *Adams* (1696), 1 Ld. Raym. 77; *Dyer* v. *Best* (1866), L. R. 1 Ex. 152.

and where to the Crown and a common informer jointly, then by the common informer within one year, and by the Crown within two years after that year has expired. But, this statute not extending to penal actions at the suit of *the party grieved*, the Civil Procedure Act, 1833, section 3, required, that these actions should be brought within *two* years after the offence had been committed, unless the particular statute which created the forfeiture should have otherwise limited the time for suing.

(5) Under the Limitation of Actions and Costs Act, 1842, section 5, the period within which any action might be brought for any thing done under the authority (or in pursuance) of any *local or personal Act of Parliament* was *two years*, or, in the case of continuing damage, *one* year after the damage had ceased; and under the Justices Protection Act, 1848, section 8, no action could be brought against any *justice of the peace* for anything done in the execution of his office, unless commenced within *six calendar months* after the act committed. And there were similar provisions in many different Acts, with respect to *constables* and other public officers acting in purported execution of their duties, the period of limitation varying in the different cases. But with reference to actions (including prosecutions) against public officers generally, it is now provided, by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), that for any alleged default in the execution of their duties by statute or otherwise, or for any act done in the execution or purported execution of such duties, the proceeding must be taken within six months. Notice prior to action is no longer required; but the proceeding is not to be commenced, at the risk of the plaintiff or prosecutor having to pay costs, without allowing time for the defendant to make tender of amends. And the plaintiff or prosecutor, if unsuccessful, pays the defendant's costs as between solicitor and client (*i*).

(*i*) *Harrop* v. *Ossett Corporation*, [1898] 1 Ch. 525.

(6.) Under the Trustee Act, 1888 (*j*), section 8, claims by *cestuis que trustent* against their trustees for breaches of trust are also now subject to the ordinary operation of the relevant statutes of limitation (*k*), the time not running against *cestuis que trustent* who are entitled in remainder or reversion until their interests fall into possession ; but the provisions of the Act, which are intended for the protection of innocent trustees only, have no application (1) where the breach of trust was fraudulent, or (2) where the trust property (or the proceeds arising from the dealing therewith in breach of trust) are still in the hands of the trustee, or (3) having been received by the trustee, have been converted by him to his own use (*l*).

Thus much upon the law of limitation both as regards realty and as regards personalty. And this distinction is to be remarked, namely, that the Real Property Limitation Act, 1833, has the effect of extinguishing the *right*, as well as of barring the *remedy* (*m*) ; but the Civil Procedure Act, 1833, and the Limitation Act, 1623, bar the remedy only, and do not extinguish the right. So that, though I can bring no action to recover a debt on contract, after the expiration of the limited period, there is nothing to prevent my obtaining payment of the debt after that period in any other manner, for example, through the medium of any lien that I may hold on the property of the debtor, or (if I am an executor) by virtue of my right of retainer. But I may not set off a debt the remedy for which is statute-barred at the time of the commencement of the action (*n*).

(*j*) 51 & 52 Vict. c. 59.

(*k*) *How* v. *Earl Winterton*, [1896] 2 Ch. 626 ; *Ellis* v. *Roberts*, [1898] 2 Ch. 142.

(*l*) *Jones* v. *Moryan*, [1893] 1 Ch. 304 ; *Thorne* v. *Heard*, [1894] 1 Ch. 599.

(*m*) 3 & 4 Will. 4, c. 27, s. 34 ; *Dawkins* v. *Lord Penrhyn* (1877), 6 Ch. D. 318 ; *Johnson* v. *Mounsey* (1879), 11 Ch. D. 284.

(*n*) *Walker* v. *Clements* (1850), 15 Q. B. 1046.

We will now summarise in tabular form the prescribed times for bringing actions and suits :

And FIRST, regarding *Land* :—

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(1.) Ejectment (otherwise called the action to recover the possession of land) :	
(A) In general - -	Twelve years, from right to the possession accrued.
(B) Where any disability at time of right to possession accruing.	Six years, from termination of disability, provided thirty years in all from time the right to the possession accrued be not exceeded.
(C) Where tenant for life has been dispossessed, and has continued dispossessed till his death, remainderman must sue.	Within twelve years from the tenant for life's dispossession, or within six years from his death.
(D) Where tenant in tail has been dispossessed, and has continued dispossessed till his death, remainderman must sue.	Within twelve years from the tenant in tail's dispossession.
(1A.) Ejectment in equity :	
(A) In general - -	The same limitation as at law.

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(1A.) Ejectment in equity—*cont.*	
(B) Where trustee has tortiously sold to a purchaser.	Twelve years from the sale.
(C) Where there has been a fraudulent dispossession.	Twelve years from the discovery of the fraud.
(D) Where the mortgagee is the plaintiff.	Twelve years from the right to possession.
(1B.) Ejectment against tenant at will or against tenant from year to year under oral agreement.	Twelve years from the end of the first year of the tenancy.
(1C.) Ejectment against ordinary lessees at a rent, paying their rent to the adverse claimant.	Twelve years from the first adverse payment of the rent.
(2.) Action to recover money charged on land (by mortgage, lien, or otherwise), or any legacy.	Twelve years after the right to receive the money or legacy has accrued.
(3.) Action to recover arrears of rent or of interest.	Six years' arrears only recoverable.
(4.) Action to recover glebe lands and the like.	Within sixty years, in general (*o*).
(4A.) Action to recover advowsons and the like.	Within 100 years, at the most (*p*).

(*o*) Or (occasionally) *three* incumbencies.

(*p*) Or (occasionally) *two* incumbencies and six years.

And SECONDLY, regarding *Property other than Land*:—

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(1.) Action of trespass *de bonis asportatis.*	Six years.
Action of detinue - -	Six years.
trover - -	Six years.
replevin - -	Six years.
(2.) Action for libel - -	Six years.
(3.) Action for slander - -	Two years.
(4.) Action of assumpsit (including debt on simple contract, and rent on parol letting).	Six years.
(5.) Action of account or on the case generally.	Six years.
(6.) Action of trespass *to the person* (including assault, battery, etc.).	Four years.
(7.) Action of debt on *specialty* contract (including rent under an indenture of lease and debts on recognizances):	
(A) In general - -	Twenty years.
(B) When included in a mortgage deed (or otherwise payable out of land) (*q*).	Twelve years.
(C) When due on any judgment.	Twelve years.

(*q*) A simple contract debt, though secured on land, is barred after six years (*Barnes* v. *Glenton*, [1899] 1 Q. B. 885).

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(8.) Action for copyhold fine -	Six years.
(9.) Action for money payable under an award when the submission is not under seal.	Six years.
(10.) Action to recover the personal estate of an intestate from his legal personal representative, or the Crown.	Twenty years.
(11.) Actions on penal statutes -	Two years (*r*).
(12.) Actions against public officers generally.	Six months.

(*r*) Or (at suit of common informer) one year.

CHAPTER XIV.

OF THE PROCEEDINGS IN AN ACTION.

We now proceed to consider the *manner* in which the remedy by action is pursued in the High Court of Justice; in other words, the proceedings in an action. Formerly, these proceedings were commenced, when in a court of common law, by *writ of summons;* when in the Court of Chancery, by *bill* (or *information*) or *petition;* when in the Court of Admiralty, by a *cause in rem* or *in personam;* when in the Court of Probate, by a *citation;* and when in the Court for Divorce and Matrimonial Causes, by a *petition* (*a*). But the Judicature Acts provided, that, on and as from the 2nd November, 1875, all such proceedings should be commenced by a writ of summons (*b*); and a *Writ of Summons* is accordingly the first proceeding in an action, although (under later rules) a large amount of legal business, more especially in the Chancery Division, may also be commenced by *Originating Summons* (*c*).

(*a*) The terms "action" and "suit" were synonymous; and by the Judicature Acts, "suit" includes "action," and "cause" includes any action, suit, or other original proceeding between a plaintiff and a defendant (Act of 1873, s. 100).

(*b*) Ord. I. r. 1; II. r. 1.

(*c*) Under the Judicature Acts, *District Registries* of the Supreme Court are established in the country, in places and districts defined by Order in Council; and in these registries, writs of summons may be issued, and other proceedings taken, such as are prescribed in the rules, down to and including entry for trial, or, (in case of non-appearance by defendant, and in some other cases) down to and including entry of final judgment. The proceedings, however, on the application of any of the parties, may be removed from the district registry to the central office of the High Court in London (Act of 1873, ss. 60—66; Act of 1875, s. 13; Appellate Jurisdiction Act, 1876, s. 22; Order in Council, 12th August, 1875).

Confining our remarks for the present to an action in the King's Bench Division, we shall consider the proceedings in such action, pursuing the order and method wherein the proceedings themselves follow each other, namely: (I.) The process; (II.) The pleadings; (III.) The trial and evidence; (IV.) The judgment; (V.) The execution; and (VI.) The appeal.

I. *The Process.*—The first object in an action is to procure the defendant to enter an *appearance* in court; and accordingly, the writ of summons commands him to enter such appearance. And the defendant complies, as is hereinafter more fully pointed out, by delivering to the proper officer of the court a memorandum containing the name of his solicitor, or else stating that he defends in person (*d*).

In antient times, there were different writs, of different degrees of stringency, issued consecutively upon each other, where, for any reason, the first writ (or, as it was called, the *original writ*) failed to be effectual (*e*); but, after a varying practice in the interval, it was afterwards provided, by the Common Law Procedure Acts, 1852, 1854, and 1860, that the proper remedy for the plaintiff, if the defendant fails to appear, is to sign judgment in his absence (*f*). It has now been provided by the Judicature Acts, that the writ of summons shall be issued out of the central office of the Supreme Court (*g*), and be tested in the name of the Lord Chancellor in all cases; and the

(*d*) See Ord. XII.

(*e*) All these writs fell under the common term, the *process*,—those subsequent to the first writ being called the *mesne process*, and writs of execution being called the *final process*.

(*f*) Sometimes, before commencing an action, some certificate (*Glen* v. *Gregg* (1882), 21 Ch. D. 513), or notice (*Flower* v. *Low Leyton* (1877), 5 Ch. D. 347) is a necessary preliminary, although, since the Public Authorities Protection Act, 1893, such notice is seldom, if ever, required. The plaintiff must, of course, see to it, that his right of action is complete, before he issues his writ or other originating process (*Frost* v. *Knight* (1872), L. R. 7 Exch. 111; *Synge* v. *Synge*, [1894] 1 Q. B. 466).

(*g*) Act of 1879, ss. 4, 5.

writ is sealed with the seal of that office, and, when so sealed, it is deemed to be issued (*h*).

The writ of summons must be carefully prepared before taking it to the central office to be issued; that is to say, the names of the parties (plaintiff or plaintiffs and defendant or defendants) must be written on the face of the writ; and there must be written on the back thereof, the following indorsements, namely:—(1) The indorsement of the claim made in the action: (2) The indorsement of the plaintiff's private address, and of his address for service, such latter address being his solicitor's office, if that is within three miles of the Royal Courts in the Strand, London, or else some other specified place within these three miles; and (3) The indorsement of the plaintiff's solicitor's name and place of business, and, if the solicitor lives in the country, the name and place of business of his town-agent.

The indorsement of claim on the writ states the nature of the plaintiff's claim. It is not essential to set forth the precise ground of the complaint, or to express the precise relief which the plaintiff claims (*i*), and the writ may (under an order giving leave to do so) (*k*) be subsequently amended in both these particulars, or the claim may be more correctly stated in the statement of claim. But it is desirable, of course, to be accurate in the first instance, —for the reason (among others) that in some cases the amended writ must be re-served (*l*). If the plaintiff sues, or the defendant is sued, in a representative capacity, *e.g.*, as executor or trustee, the indorsement of claim must show the fact (*m*). Where the action is for the recovery of a debt or liquidated demand in money, with or without interest, and arises on a contract, or on a statute, or upon

(*h*) Ord. V. r. 11.

(*i*) Ord. III. r. 2.

(*k*) Ord. XXVIII. r. 1; and (as to *parties*) Ord. XVI. rr. 2, 11. Applications for leave to amend, and nearly all other interlocutory applications are made, not in open court, but to a judge or master sitting in chambers. In most cases a master has jurisdiction (see Ord. LIV. r. 12), but his decision is subject to an appeal to the judge.

(*l*) Ord. XVI. r. 13; XXVIII. r. 10.

(*m*) Ord. III. r. 4.

a trust, the plaintiff may "specially indorse" his writ (under Order III. rule 6) with the particulars of the amount sought to be recovered, giving credit for any payment or set-off, and mentioning also a sum for costs, and stating that upon payment of the amount claimed and the specified costs, within the time mentioned on the writ, the action will be stayed. And a landlord (including a mortgagee) (*n*) may, as against his own tenant whose term has expired or been duly determined by notice to quit, or become forfeited for non-payment of rent,—or as against any sub-tenant of the latter,—specially indorse his writ (under Order III., rule 6) with a claim to recover the possession of the land, with or without mesne profits (*o*). But, except as above stated, a landlord claiming the possession as for a forfeiture of the lease (*p*), or under a right of re-entry for condition broken (*q*), is not entitled to proceed by way of special indorsement. A special indorsement under Order III., rule 6, is deemed to be a statement of claim (*r*).

The writ of summons, after the issue thereof, is to be served on the defendant ; and the service is required to be personal (*s*), that is to say, a copy of the writ must be put into the defendant's hands, or left in his presence, with (in the latter case) a verbal intimation to him that the slip of paper is a copy writ. The person serving the writ must also show the original writ to the defendant, if he desires to see it (*t*) ; and must within three days at the most after service, indorse on the original the day of the month and week of the service (*u*). Where husband and wife are

(*n*) *Daubuz* v. *Lavington* (1884), 13 Q. B. D. 347 ; *Kemp* v. *Lester*, [1896] 2 Q. B. 162.

(*o*) *Southport Tramways* v. *Gandy*, [1897] 2 Q. B. 66.

(*p*) *Burns* v. *Walford*, W. N. (1884), 31 ; *Arden* v. *Boyce*, [1894] 1 Q. B. 796.

(*q*) *Mansergh* v. *Rimell*, W. N. (1884), 34.

(*r*) Ord. III. r. 6 ; Ord. XX. r. 1 ; *Anlaby* v. *Praetorius* (1888), 20 Q. B. D. 764.

(*s*) Ord. IX. r. 2.

(*t*) *Goggs* v. *Huntingtower* (1844), 12 M. & W. 503.

(*u*) Ord. IX. r. 15.

co-defendants, service on the husband is not *primâ facie* service on the wife, but the wife also must be served, unless the court otherwise orders (*x*). Where the defendant is an infant, the service is *primâ facie* good if effected on his or her father or guardian, or (if none) then on the person with whom the infant resides, or under whose care he or she is (*y*) ; and where the defendant is a lunatic so found by inquisition, service on his or her committee is good service ; and when a defendant of unsound mind has not yet been found so by inquisition, the service is *primâ facie* good if effected on the person with whom he or she resides, or under whose care he or she is (*z*). Where the defendant is in the legal possession of the premises which the plaintiff claims to recover the possession of, and the plaintiff cannot effect personal service on the defendant, and the premises are vacant, the service may by order be deemed sufficient if a copy of the writ is posted upon the door of the dwelling-house, or upon some other conspicuous part of the property (*a*). As regards *partners*, where they are sued in the name of their firm, the writ is to be served upon a partner or partners personally, or else it is to be served at the principal place (within the jurisdiction) of the partnership, upon some person having at the time the control or management of the business there (*b*). As regards corporations aggregate (not being limited companies), the service is upon the manager, clerk, treasurer, or secretary (*c*) ; and in the case of hundreds, the service is on the high constable (*d*). Limited companies are served in the way appointed by statute (*e*) ; that is to say, the writ is either to be left at the registered office of the company, or

(*x*) Ord. IX. r. 3.
(*y*) Ord. IX. r. 4.
(*z*) Ord. IX. r. 5 ; *Fore Street Warehouse Co.* v. *Durrant* (1883), 10 Q. B. D. 471.
(*a*) Ord. IX. r. 9.
(*b*) Ord. XLVIIIA. r. 3.
(*c*) Ord. IX. r. 8.
(*d*) *Ibid.*
(*e*) *Ibid.*

is to be sent by post to the registered office of the company in a prepaid letter addressed to the company (*f*).

Where personal service cannot be promptly effected on a defendant who, at the date of the issue of the writ, was within the jurisdiction, and could legally be served, the plaintiff may obtain an order for substituted or other service, or for the substitution of notice for service (*g*). Such an order is to be obtained on an affidavit showing sufficient grounds for it (*h*), as that the defendant is keeping out of the way to avoid service, in which case service by sending a copy of the writ and of the order to his residence by post is usually required.

Assuming the action to be one within the jurisdiction of the court (*i*), if the plaintiff desires to serve the writ upon (or to give notice of it to) a defendant out of the jurisdiction, he must obtain an order giving him leave to do so, which order will be obtained on an affidavit showing in what place or country the defendant is, and whether or not he is a British subject ; and showing also the nature of the plaintiff's claim in the action, and the ground on which he asks for the order (*k*). By order XI. rule 1, service out of the jurisdiction may be allowed in the following cases, and in no others (*l*), viz., (1) when the whole action regards land within the jurisdiction ; (2) when the whole action regards the construction, rectification, specific performance, or rescission of some contract or other document relating to land within the jurisdiction, or is otherwise for the enforcement of some liability affecting such land ; (3) where the defendant is domiciled or ordinarily resident within the jurisdiction ; (4) where the action is for the administration of the estate of a deceased

(*f*) Companies Act, 1862, s. 62.
(*g*) Ord. IX. r. 2.
(*h*) Ord. X.
(*i*) *Bree* v. *Marescaux* (1881), 7 Q. B. D. 434.
(*k*) Ord. XI.
(*l*) Ord. XI. r. 2 ; *Lenders* v. *Anderson* (1883), 12 Q. B. D. 50.

person whose domicile was English at the time of his death, or is for the execution of the trusts of some written instrument, and the execution is governed by the law of England, and relates to property within the jurisdiction, and the defendant is a trustee of the instrument; (5) where the action is for breach within the jurisdiction of any contract, wherever made, which, according to its terms, was to be performed within the jurisdiction; (6) where the action is for an injunction to operate within the jurisdiction; and (7) where the action is properly brought against some other person duly served within the jurisdiction, and the party to be served abroad is a necessary or proper party to the action. But, as regards the fifth of these groups of cases, the service cannot be directed if the defendant is domiciled or ordinarily resident in Scotland or Ireland, although, as regards all the other groups, the question is simply one of convenience as regards service in either of these two countries.

At the time of first issuing the writ, or within twelve months thereafter, the plaintiff may issue one or more concurrent writ or writs, with a seal containing the word "Concurrent," impressed on each, such seal showing also the date when the concurrent writ was issued. A concurrent writ is in force so long as the original writ is in force, and no longer (*m*); and as the original writ is in force for one year only (*n*), though it may be kept in force for an indefinite time beyond the year by being "renewed" in manner to be presently explained, the concurrent writ must be correspondingly kept in force. A writ for service within the jurisdiction may be issued concurrently with one for service out of the jurisdiction, and *vice versâ* (*o*).

In case the defendant,—or, where there are co-defendants, any defendant,—shall not have been served with the writ, the plaintiff may apply before the expiration of

(*m*) Ord. VI. r. 1.
(*n*) Ord. VIII. r. 1.
(*o*) Ord. VI. r. 2.

the year for an order for the *renewal* of the writ ; and such order will be obtained, upon application at chambers, supported by an affidavit showing that reasonable efforts have been made to serve the defendant. The renewal is for six months ; but a second or other further renewal may be ordered, in the like manner and upon the like grounds, at any time during the currency of the last preceding renewal (*p*). The effect of renewing the writ is to keep alive the action for all purposes ; and especially to prevent the statutes of limitation becoming a bar to the remedy (*q*).

The defendant *appears* to the writ of summons by leaving, or causing his solicitor to leave, at the central office, a memorandum which purports to authorize the proper officer to enter an appearance for him ; and the officer seals and delivers to the defendant or his solicitor a duplicate of the memorandum, and the defendant or his solicitor thereupon sends to the plaintiff (or to the plaintiff's solicitor) that duplicate, together with a written notice of his appearance (*r*). The memorandum of appearance must contain the defendant's solicitor's business address (or, if the defendant appears in person, the defendant's own residential address), and, in either case, an address for service within three miles of the courts (*s*). Where the defendant is an infant, he enters his appearance to the writ by his guardian *ad litem*, the fitness of such guardian to act as such being verified by his solicitor's affidavit (*t*) ; and if an infant makes default in appearing, then the plaintiff, after the expiration of the time specified for appearance, gives six clear days' notice of his intention to apply to the court for the appointment of a guardian *ad litem* to such infant, such notice being first served upon, or at the dwelling-house of, the person

(*p*) Ord. VIII. r. 1.

(*q*) *Doyle* v. *Kaufman* (1877), 3 Q. B. D. 7, 340 ; *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488.

(*r*) Ord. XII. r. 9.

(*s*) *Ibid.* rr. 10, 11.

(*t*) Ord. XVI. r. 18.

who is in charge of the infant when the writ is served, and being further served (when the infant is not in charge of his father or guardian) upon, or at the dwelling-house of, his father or guardian, if any (*u*).

If the writ of summons is indorsed with a claim for the recovery of land, any person claiming to defend as landlord of the defendant (although not himself a defendant) may, upon an affidavit of his actual or constructive possession, obtain an order giving him leave to appear and defend ; and thereupon he leaves his memorandum of appearance at the central office, and gives notice thereof to the plaintiff. After that, he is named as a defendant, and is treated as such in all the subsequent stages of the action (*x*). In his memorandum of appearance, he is required to state that he appears as landlord ; and he may also (if the fact is so) state, that he limits his defence to any specified part of the premises (*y*). Partners, sued in the name of their firm, appear individually and in their own names (*z*), a rule which applies also to one individual trading under, and sued in, the firm name (*a*).

In case the memorandum of appearance contain no "address for service," it will be rejected (*b*) ; and in case the address given as the residential address of the defendant is fictitious or illusory, the plaintiff may obtain an order setting it aside (*c*).

In lieu of appearing, the defendant may, if the writ or service is irregular, apply to set aside the writ or the service thereof upon him, and, for that purpose, to discharge the order (if any) which purports to authorize such service (*d*),—*e.g.*, when the provisions as to service out of the jurisdiction have been disregarded. The defendant may also, in a proper case,—for example, where he is a mere custodian of the subject-matter in dispute,—

(*u*) Ord. XIII. r. 1.
(*x*) Ord. XII. rr. 25—27.
(*y*) *Ibid.* r. 28.
(*z*) Ord. XLVIIIA. r. 5.
(*a*) *Ibid.* r. 11.
(*b*) Ord. XII. r. 12.
(*c*) *Ibid.*
(*d*) *Ibid.* r. 30.

issue an *interpleader* summons in lieu of appearing (*e*). Where, in an action against partners, anyone has been served as a partner, and he denies that he is a partner, he should enter an appearance under protest (*f*).

Supposing service to have been duly effected, then, if the defendant fails to enter an appearance within the time limited the plaintiff may, in certain cases, at once enter judgment for the relief claimed by the indorsement of claim on the writ, but only if the writ is *specially indorsed* under Order III., rule 6, or if the indorsement, although not special, is for a liquidated demand. And where the claim is by a landlord for the recovery of the possession of land (the defendant being his own tenant, or a sub-tenant of such tenant), the judgment is for the recovery of such possession, with or without mesne profits, arrears of rent, or damages for breach of contract, according to the tenor of the claim (*g*).

Where the claim indorsed on the writ is for pecuniary damages, or for the detention of goods, or for both, and the defendant fails to appear, then the plaintiff, on filing an affidavit of service, may enter an interlocutory judgment in respect of his claim, and obtain a writ of inquiry to assess the damages, or an order that they be otherwise ascertained (*h*). And here we may conveniently notice, that in all cases of account (*e.g.*, a partnership, or executorship, or trust account), where the plaintiff in the first instance desires to have an account taken, he is to indorse the writ with a claim that such account be taken; and in that case, an order for the account may be forthwith obtained, as well upon default of appearance, as also if there is no such default (*i*).

(*e*) Ord. LVII. r. 4. See *post*, p. 684.

(*f*) Ord. XLVIIIA. r. 7.

(*g*) Ord. XIII. rr. 8, 9; *Daubuz* v. *Larington* (1884), 13 Q. B. D. 347; *Arden* v. *Boyce*, [1894] 1 Q. B. 796; *Southport Tramways* v. *Gandy*, [1897] 2 Q. B. 66.

(*h*) Ord. XIII. r. 5.

(*i*) Ord. III. r. 8; Ord. XV.; *Bennett* v. *Bowen* (1882), 20 Ch. D. 538; *Smith* v. *Davies* (1884), 28 Ch. D. 650; *Blake* v. *Harvey* (1885), 29 Ch. D. 827.

Judgment signed in default of appearance may, however, be set aside on the defendant's application, if he can show either that the judgment was improperly signed, or that he did not intentionally fail to appear, and has a good defence to the claim (*k*).

In cases in which the writ is specially indorsed under Order III. rule 6, the plaintiff may, after the defendant has appeared, apply under Order XIV. rule 1, for an order giving him leave to sign final judgment. This application must be supported by an affidavit showing that the plaintiff's claim is a good one; and, unless the defendant on the hearing of the application shows by affidavit or otherwise that he has a defence to the action, or ought to be allowed to defend it, an order for judgment will be made. If the defendant shows a defence to the action, or such facts as in the opinion of the master entitle him to defend it, he will be given leave to defend either unconditionally, or conditionally on his bringing the amount claimed or part of it into court. Where leave is given to the defendant to defend, conditionally or unconditionally, the master who gives the leave generally gives at the same time directions as to the further conduct of the action, as regards pleadings, particulars, and admissions; discovery and interrogatories; and place and mode of trial, equally as upon the *Summons for Directions* to be presently mentioned (*l*). And, in particular, he may order the action to be forthwith set down for trial, and to be put in the "*Short Cause List*," being a list of actions which will only take a short time to try (*m*).

Except in the cases hereinafter mentioned, the plaintiff, after the defendant has appeared, must take out what is called a "summons for directions." He cannot take any further step in the action except an application for an

(*k*) Ord. XIII. r. 10.
(*l*) Ord. XIV. r. 8; Ord. XXX. r. 1 (c).
(*m*) *Ibid.*

injunction or a receiver, or the signing of judgment in default of defence, until after he has taken out this summons (*n*). If the plaintiff fail to take out such summons, the defendant may apply to dismiss the action ; and, on such latter application, the action will (in a proper case) be dismissed, but the application may, and more usually will, be simply treated as a summons for directions. On the summons for directions, the master will give all proper directions, as to the delivery of pleadings and particulars, and as to the making of admissions, and as to discovery, interrogatories, inspection of documents, and inspection of property, and as to commissions and the examination of witnesses, and as to the place and mode of trial. No affidavit is to be used in support of the summons, unless where the master requires it (*o*). On the plaintiff's summons, the defendant may obtain any necessary directions, or order ; and conversely, the plaintiff, on the defendant's summons (*p*).

The summons for directions is, however, not *necessary* when the writ is specially indorsed under Order III., r. 6 (see *ante*, p. 563), or when the action comes within Order XVIIIA. (see *infra*), or in proceedings commenced by originating summons ; but it *may* be taken out in all these cases (*q*).

A plaintiff may indorse on the writ a notice of his intention to proceed to trial without pleadings ; and, in that case, no pleadings are to be delivered, unless the master, on the defendant's application, orders them to be delivered (*r*).

Where several actions instituted by the same plaintiff or plaintiffs are pending in the same division of the court, and the question or questions in dispute are substantially the same in all the actions, the master will, upon the

(*n*) Ord. XXX. r. 1, as amended July, 1902.
(*o*) Ord. XXX. r. 3.
(*p*) *Ibid.* r. 4.
(*q*) Ord. XXX. r. 1*d*.
(*r*) Ord. XVIIIA. r. 6.

application of the divers defendants, and so soon as they have appeared, order the several actions to be consolidated, *i.e.*, to proceed as one action (*s*). And where several actions by different plaintiffs are pending in the same division against the same defendant, the master will, in general, where the question in dispute is substantially the same in all the actions, select one of the actions as a *test action*, the divers plaintiffs agreeing to try that action first and to accept the result therein as decisive of all the actions: and the trial of the other actions will meanwhile be directed to stand over (*t*).

Arrest on mesne process was finally abolished by the Debtors Act, 1869. Still, however, in the very rare cases, in which the plaintiff can show both that a defendant who was within the jurisdiction at the time the writ is issued, intends to go out of the jurisdiction before final judgment can be obtained in the action, *and* that he requires the defendant to remain within the jurisdiction for the purpose of giving evidence, he may obtain an order for the arrest of the defendant, for a period not exceeding six months, or until he has given security not to go out of the jurisdiction without the leave of the court (*u*). This order may be obtained *ex parte*, at any time between the commencement of the action and the judgment, the plaintiff showing, by affidavit, that he has a good cause of action to the amount of 50*l.* or upwards, that there is reasonable ground for his suspicion of the defendant's intention to go out of the jurisdiction, and that the plaintiff requires the defendant to remain for the purpose of giving evidence. Under the order so obtained, the sheriff of the county in which the action is to be tried, arrests the defendant, and the defendant remains in custody for the time mentioned

(*s*) Ord. XLIX. r. 8.

(*t*) *Amos* v. *Chadwick* (1877), 4 Ch. D. 869; 9 Ch. D. 459; and *Robinson* v. *Chadwick* (1878), 7 Ch. D. 878.

(*u*) Debtors Act, 1869, s. 6; Ord. LXIX. r. 1; *Drover* v. *Beyer* (1879), 13 Ch. D. 242; *Colverson* v. *Bloomfield* (1885), 29 Ch. D. 341.

in the order, or until final judgment in the action (*x*), or until the defendant shall, by bond (*y*), or otherwise, have given security to the plaintiff's satisfaction.

All persons may be joined as plaintiffs in an action, in whom any right to relief, *in respect* of, *or arising out* of, the *same transaction or series of transactions*, is alleged to exist, whether jointly, severally, or in the alternative, *i.e.*, where, if there were separate actions, a common question of law or of fact, *material to the decision*, would arise (*z*); the defendant being, however, entitled in general to his costs occasioned by any misjoinder (*a*). Parties may at any stage be struck out or added by order (*b*); but a plaintiff can only be joined, if he consent. Infants sue by their next friends, and defend by their guardians *ad litem* (*c*); and lunatics so found by inquisition sue, and are sued by, their committees, both the lunatic and the committee being made co-plaintiffs or co-defendants (*d*). Married women used to sue by their next friends, and to be sued by themselves and their husbands; but they now sue and are sued exactly like single women (*e*).

II. *The Pleadings.*—By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), great alterations were introduced into the *pleadings* in an action; the object of the reform being, to establish a method, built indeed on the old foundations, but with an improved design as regards simplicity and despatch (*f*). Under the Judi-

(*x*) *Hume* v. *Druyff* (1873), L. R. 8 Exch. 214.

(*y*) *Betts* v. *Smyth* (1841), 2 Q. B. 113.

(*z*) Ord. XVI. r. 1 (1896); *Smurthwaite* v. *Hannay*, [1894] A. C. 494; *Carter* v. *Rigby*, [1896] 2 Q. B. 113; and *Stroud* v. *Lawson*, [1898] 2 Q. B. 44.

(*a*) Ord. XVI. r. 1.

(*b*) *Ibid.* r. 11.

(*c*) *Ibid.* r. 16.

(*d*) *Ibid.* r. 17.

(*e*) *Ibid.* r. 16.

(*f*) From a period of very remote antiquity, down to 1852, the "pleadings" were of a highly artificial character; and had been elaborated, during many successive centuries, into a regular system or science called *pleading*, or more properly *special pleading*, which was a system of high intrinsic value, developing the point in

cature Acts, the rules of pleading have been again remodelled; but the general object of the pleadings is still the same, namely, to develop the point or points in controversy between the parties, or, as these points are called, the *issues* (*g*).

For the purpose of arriving at the issue, it is a rule of pleading, that the statements or mutual allegations shall always consist of matters of *fact*, and of fact only; for matters of *law* are judicially noticed by the courts (*h*). It is also a rule of pleading, that, in their allegations of fact, the pleaders are to abstain from any statement of the *evidence* by which the fact is to be established; for matter of evidence is superfluous so far as the object of pleading is concerned, which is merely to ascertain the question or issue, to be determined at the trial (*i*).

The first pleading is the *statement of claim* (*k*); which corresponds to the old *declaration* in a common law action, and to the old *bill of complaint* in Chancery. Under the practice formerly in use, the venue (that is, place for trial) had to be named in the statement of claim; but now this is always fixed on the summons for directions (*l*). The statement of claim alleges, in distinct and numbered paragraphs, and as briefly as is consistent with the nature of the case, the facts upon which the plaintiff relies, and

controversy with the severest precision, and materially shortening the duration of the trial.

(*g*) *Thorp* v. *Holdsworth* (1876), 3 Ch. D. 637; *Piercy* v. *Young* (1880), 15 Ch. D. 475.

(*h*) Ord. XIX. r. 4. It is, however, not unusual, at all events in the defence and subsequent pleadings, for the pleader to insert contentions in point of law on which he relies. (See Ord. XXV. r. 2.)

(*i*) The rules of pleading under the Judicature Acts, direct that the court or a judge may, at any stage of the proceedings, strike out or amend anything scandalous, or which tends to prejudice, embarrass, or delay the fair trial of the action (Ord. XIX. r. 27); and all such amendments are to be made as may be necessary, for the purpose of determining the real questions or question in controversy between the parties (Ord. XXVIII. r. 1).

(*k*) Ord. XIX. r. 2.

(*l*) Ord. XXXVI. r. 1, as amended July, 1902.

under which his claim arises; and adds thereto a claim for the relief or remedy which is desired (*m*).

After the plaintiff has delivered his statement of claim, it is the defendant's turn to consider in what manner it shall be encountered; and he is to address himself to this subject in the following manner. If the statement of claim appears on the face of it substantially insufficient, in point of law, to entitle the plaintiff to what he claims,—in other words, if it does not show any cause of action—the defendant used to *demur* (*n*), that is, used to deliver a written formula, called a *demurrer* (from *demorari*), importing that he denied such sufficiency on some ground therein stated (*o*). But demurrers (*eo nomine*) have been abolished; and it is now provided, that, in lieu of demurring, the defendant may raise in his defence the question of the sufficiency in law of the pleading (*p*). If, on the other hand, the statement of claim appears *ex facie* to show a good cause of action, then the defendant's course is to deliver his *defence*, the general object of which is to make answer, in point of *fact*, to the statement of claim (*q*). And if he delivers no defence, within the time allowed by the practice of the court for that purpose, the plaintiff will be entitled either to enter judgment against him (*r*), or to apply to the court to give such judgment as he may be entitled to on his statement of claim, according to the nature of his claim (*s*).

The defence might formerly have been either "dilatory"

(*m*) Some forms of statements of claims in actions, and the appropriate subsequent pleadings, are given in Appendices (C), (D), and (E) to the Rules of 1883.

(*n*) *Metropolitan Railway Company* v. *Defries* (1877), 2 Q. B. D. 387.

(*o*) Prior to the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), a demurrer was either *general* or *special*; that is, it either objected in general terms only, or it set forth some particular objection. But by that Act special demurrers were abolished.

(*p*) Ord. XXV. r. 2.

(*q*) Ord. XIX. r. 2.

(*r*) Ord. XXVII. rr. 2, 4, 6, 7, 8, 9.

(*s*) Ord. XXVII. r. 11.

or "peremptory"; a dilatory defence having been one founded on some matter of fact unconnected with the merits of the case, and a peremptory defence having been one founded on the merits. Dilatory defences were either (1) Pleas *to the jurisdiction*, showing that, by reason of some matter therein stated, the case was not within the jurisdiction of the court; or (2) Pleas of *suspension*, showing some matter of temporary incapacity to proceed with the suit. The effect of such a defence (if established) was to defeat the particular action, but to leave the plaintiff at liberty to commence another (*t*). There might also, formerly, have been a defence or plea *in abatement* of the action, one of the usual grounds for such a defence having been some defect in the parties to the action, as, for instance, the non-joinder of a co-contractor. But pleas in abatement are now abolished; and objections which were formerly raised by them can now be enforced by application in chambers to stay the action until the defect is put right (*u*).

The defences to an action on the *merits* are, of course, various. For, first, they may consist of a *denial* or *traverse* of that which is alleged by the plaintiff in his statement of claim; and, under the system of pleading in use before the Judicature Acts, defences by way of denial might have been by way of general denial, raising the "general issue"—as, for example, in trespass or trespass on the case, that the defendant was "*not guilty*," in debt on bond, that it was "*not his deed*," in certain other cases of debt, that the defendant "*never was indebted* as alleged," and in assumpsit, that he "*did not promise*

(*t*) Under the Judicature Acts, an action is not abated, by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue; and does not become defective, by the assignment, creation, or devolution of any estate or title *pendente lite*. But the "successor in interest" may be ordered to be made a party to the action; and the action is then continued by or against him, or is otherwise disposed of as may be just. (Ord. XVII. rr. 1—4.)

(*u*) Ord. XXI. r. 20; *Kendall* v. *Hamilton* (1879), L. R. 4 App. Ca. 504.

as alleged." By the present rules of pleading, however, it is not sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim ; but each allegation of fact, of which the truth is not admitted, must be dealt with specifically (*x*).

Again, secondly, defences on the merits may be either in *justification* or *in discharge*. A defence by way of justification is where, *e.g.*, in an action for assault and battery, the defendant pleads *son assault demesne* (*i.e.*, self defence) ; or where, in an action for slander, the defendant pleads that the words spoken are true. A defence in justification shows that (in effect) there *never* was any right of action ; but a defence by way of discharge always shows the cause of action to have been once existing, and merely alleges that it has been barred by matter subsequent, as by payment, or release, or by accord and satisfaction, or by *set-off*, or by the statutes of limitation.

Or, thirdly, the defendant may plead by way of *counter-claim ;* that is to say, he may allege that he (the defendant) has a claim against the plaintiff, for which he might bring his action. And, under the Judicature Acts, it is provided, that a defendant may, by way of counterclaim, set up any right or claim, whether legal or equitable, and whether sounding in damages or not, which he may have against the plaintiff. Such counterclaim has the same effect as a statement of claim in a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim ; and where the counterclaim of the defendant is established, the court may, if the balance be in the defendant's favour, give him judgment for that amount, or may otherwise adjudge to the defendant such relief as he may, on the merits of the case, be entitled to (*y*).

(*x*) Ord. XIX. r. 17. By Ord. XXI. r. 19, the right to plead not guilty by statute was preserved ; but that plea is practically abolished by the Public Authorities Protection Act, 1893.

(*y*) Ord. XIX. r. 3; XXI. r. 11 ; Act of 1873, s. 24.

With respect to all defences on the merits, they either *traverse* (that is, deny) the matters of fact alleged in the plaintiff's statement of claim, or else *confess and avoid* them (that is, while admitting them to be true, they at the same time show some new matter of fact which obviates the legal effect of them). For example, in an action for an assault and battery, the defence may consist of a denial of the assault alleged; or it may be to the effect, that the defendant was first assaulted by the plaintiff, and merely defended himself (*son assault demesne*), admitting (or confessing) the act of violence on the part of the defendant, but *avoiding* the legal liability, by showing circumstances of excuse or justification (*z*).

Under the latter head properly fall also certain anomalous defences. Thus, in an action for a debt or liquidated demand, the defendant may avail himself of the defence of *tender*, that is, he may plead, that he has been always ready to pay the demand, and that, before the commencement of the action, he tendered it to the plaintiff, and now brings it into court ready to be paid to him. And in any action brought to recover a debt or damages, the defendant may plead *payment into court*, *i.e.*, that he brings a certain sum of money into court, ready to be paid to the plaintiff, and that it is enough to satisfy the plaintiff's claim (*a*). A defendant may also, in a proper case, raise the defence of *estoppel*—as that the plaintiff ought not to be permitted to make a certain allegation, because he has formerly done some solemn act involving an assertion to the contrary (*b*).

(*z*) Ord. XIX. rr. 15 and 27.

(*a*) Ord XXII.; *Greaves* v. *Fleming* (1879), 4 Q. B. D. 226; *Buckton* v. *Higgs* (1879), 4 Ex. D. 174; *Hawkesley* v. *Bradshaw* (1880), 5 Q. B. D. 302; *Heatley* v. *Newton* (1881), 19 Ch. D. 326.

(*b*) The most usual estoppel is by *deed*; but there are, besides, other species of estoppel, namely, estoppel by *record*, and estoppel by matter *in pais*,—the first obtaining where any fact is alleged in a court of record, or any judgment is given therein, and the second obtaining where the act is done out of court (*Wilkinson* v. *Blades*, [1896] 2 Ch. 788; Plowd. 434; Co. Litt. 260, 352 a; *Pargeter* v. *Harris* (1845), 7 Q. B. 708; *De Mora* v. *Concha* (1885), 29 Ch. D. 268).

But, as regards all these defences, it is evident, that they are in the nature of exceptions to the general classification above stated; for in the two first (admitting, as they do, the right of action), there is a confession, without avoidance, and in the last, there is neither traverse, confession, nor avoidance.

The defence being delivered, it is then to be encountered by the plaintiff. If the plaintiff merely wants to deny the allegations in the defence, no further pleading is necessary, and those allegations will be deemed to be denied (*c*). If, however, the plaintiff desires to raise some point of law, or to confess and avoid the defence, or any part of it, or to raise any special reply, he must obtain leave to deliver a reply (*d*). Instead of replying, however, the plaintiff may (*e*) amend his statement of claim; and he may do so once, without any order for the purpose, provided he do it before replying (*f*). And to all pleadings applies the general rule, that neither party may (except by way of amendment) depart from or vary the claim or defence which he has once insisted on; for such a *departure*, or inconsistent pleading, might occasion endless altercation. And therefore the reply must support the statement of claim, without raising any new ground of claim; nor may the defendant, in any subsequent pleading, allege any fact inconsistent with his defence (*g*). Every such inconsistency or departure, if really substantial, would be a ground for striking out the pleading as embarrassing (*h*).

The rejoinder, if any, to the reply, must be delivered

(*c*) Ord. XXVII. r. 13.

(*d*) Ord. XXIII. r. 1.

(*e*) *Ibid.* r. 6.

(*f*) Ord. XXVII. r. 13; Ord. XXIII. r. 4. In the present system of pleading, no pleadings beyond the reply are mentioned by any distinctive name; but under the former system, there were recognised a *rejoinder* on the part of the defendant to the replication, a *surrejoinder* from the plaintiff, a *rebutter* by the defendant, and a *surrebutter* on the part of the plaintiff.

(*g*) Ord. XIX. r. 16; *Bartlett* v. *Wells* (1862), 1 B. & S. 836; *Brine* v. *Great Western Railway Company* (1862), 2 B. & S. 402.

(*h*) Ord. XIX. r. 16.

within four days (*i*) : and no pleading may be pleaded subsequent to reply, unless by leave of the court, and upon terms (*k*).

It may, however, happen, that even after the pleadings are closed,—or before the close of the pleadings,—some new matter may arise, affording a defence to the action upon the merits (*l*) ; as that the plaintiff has, since the commencement of the action, given the defendant a release. In such cases, the defendant (or the plaintiff, if such matter arise in respect of a counterclaim) may, by leave, deliver a further defence or a further reply, setting forth the new matter (*m*). In case the opposite party shall admit the sufficiency of the further defence or further reply, he may do so by delivering a confession thereof ; and he is, in that case, entitled, in general, to sign judgment for the costs of the action previously incurred (*n*).

With a view to clearness, we have hitherto supposed, that the plaintiff's statement of claim comprises only a single claim, and that the defendant pleads only a single defence ; but the plaintiff may have occasion to bring forward several distinct claims, and if so, he may join them together in one statement of claim (*o*). And although at the time when the Judicature Acts came into operation, this liberty was confined to claims in the same right and between the same parties, the plaintiff may now unite, in the same action and in the same statement, several causes of action, subject to this, that (unless by leave) no cause of action may be joined with a claim for recovery of possession of land, except claims for mesne profits and for arrears of rent in respect of the premises

(*i*) Ord. XXIII. r. 3.

(*k*) *Ibid.*

(*l*) Formerly, such a defence was known as a plea *puis darrein continuance*, being so named because pleaded since the last adjournment of the court such adjournments having been formerly called *continuances*. (*Beddall* v. *Maitland* (1881), 17 Ch. D. 174.)

(*m*) Ord. XXIV. rr. 1, 2.

(*n*) *Ibid.* r. 3.

(*o*) Such cumulative statements used to be called *counts*.

and the like (*p*), and (unless by leave) a trustee in bankruptcy may not join claims in his official with claims in his individual capacity (*q*), and subject also to this, that, if it appear to the court that any of the claims cannot be conveniently tried together, separate trials thereof may be ordered (*r*). So, also, the defendant may, on his side, desire to bring forward several distinct matters of defence; and he may do so, provided he do not thereby unfairly embarrass the plaintiff (*s*). It used also to be competent to the defendant to demur to part of the statement of claim, and to put in a defence to the other part, or (after obtaining leave from the court or a judge) to demur and plead to the same matter ; and he may still raise objections in points of law, and at the same time raise defences on the facts. It is obvious, therefore, that the pleadings do not always lead to the production of a *single* issue only, but often to the production of *several* issues. And where the pleadings do not sufficiently disclose the issues of fact in dispute between the parties, they may be directed to *prepare issues ;* but this is seldom, if ever, necessary (*t*).

Where a point of law is raised in the pleadings, the master may order that such point of law be set down for hearing before the trial of the issue of fact (*u*) ; and when the decision on the point of law may dispose of the whole matter, and save the expense of any further trial, this is a convenient course,

When there is no dispute of fact, but the question is one of law, the parties may agree to the statement of a special case for the opinion of the court (*x*). This special case

(*p*) Ord. XVIII. r. 2; 15 & 16 Vict. c. 76, s. 41 ; *Davies* v. *Davies* (1862), 1 H. & C. 451.

(*q*) Ord. XVIII. r. 3.

(*r*) *Ibid.* r. 1.

(*s*) *Spurr* v. *Hall* (1877), 2 Q. B. D. 615 ; *Berdan* v. *Greenwood* (1878), 3 Ex. D. 251.

(*t*) Ord. XXXIII. r. 1 ; *Piercy* v. *Young* (1880), 15 Ch. D. 475.

(*u*) Ord. XXV. r. 2.

(*x*) Ord. XXXIV. ; Ord. XXV. r. 3 ; *Johnasson* v. *Bonhote* (1876), 2 Ch. D. 298.

consists of an agreed statement of the fact, followed by the question of law arising thereon, which the parties desire to have decided (*y*). And, at any time before or at the trial, if it appear to the court, that there is a preliminary question of law to be decided, and that the proof of facts is a matter subordinate thereto, the court may order the question of law to be decided on a special case sufficiently raising it; and in the meantime the proof of facts is stayed (*z*).

As regards the plea of payment into court—a defence which is available (under Order XXII. rule 1) in any action which is brought to recover a debt or damages—the payment may be made either as an admission of liability to the extent of the amount paid, or with a defence denying any liability, but offering the amount in satisfaction of the claim alleged. If the payment into court is made before delivering the defence, the defendant must serve the plaintiff with a notice of the payment in; and the notice is to specify the claim in respect of which the money is paid in (*a*). If the payment into court is made at the time of delivering the defence, the defendant must (in his defence) signify the fact of payment in, specifying also the claim in respect of which the money is paid in (*b*); and so, in the case of a tender before action (*c*). The money paid in will be paid out to the plaintiff on his request (*d*) in the following cases:—(1) Where the payment in has been made before defence; (2) Where the payment in has been made at the time of delivering the defence, and there is no denial of liability in the defence; (3) Where the payment in has been made at the time of delivering the defence, and there is an allegation in the defence of tender before action. Where there is a denial of liability in the

(*y*) Ord. XXXIV. r. 1.
(*z*) *Ibid.* r. 2.
(*a*) Ord. XXII. r. 4.
(*b*) *Ibid.* r. 2.
(*c*) *Ibid.* r. 3.
(*d*) *Ibid.* r. 5.

defence, the plaintiff may accept in satisfaction of his claim the money paid in (*e*), and in that case he can get the money paid out to him. He may, however, refuse to do so, and thereafter he will proceed, at his own peril, with the action (*f*). And if he fails altogether, or does not recover more than the amount paid in, he will generally have to pay all the defendant's costs. The plea of payment into court is also available by way of defence to a counterclaim (*g*).

The time for delivering statement of claim is, in general, twenty-one days after the order made on the summons for directions (*h*), and the time for delivering the defence is, in general, ten days after the statement of claim is delivered (*i*); and the time for delivering the plaintiff's reply (if any is ordered) is, in general, ten days after the defence is delivered (*k*); and the time for delivering a rejoinder (if any) is ordered in general, four days after the reply is delivered (*l*). When a writ is specially indorsed (under Order III. rule 6), the indorsement of claim thereon is the only statement of claim (*m*).

As regards the general character of the pleadings, it is required, by the rules made under the Judicature Acts, that they shall be as brief as the nature of the case will admit (*n*); and the prescribed forms are to be used where applicable, though not in a slavish way. Every statement of claim, and also every counterclaim, is to state specifically the relief wanted, but need not also ask for general relief (*o*); and separate and distinct facts, made the basis of separate and distinct claims, are to be kept separate in each (*p*). Every defence to a statement of claim, and

(*e*) *Ibid.* r. 6.
(*f*) *Ibid.* r. 6.
(*g*) *Ibid.* r. 9.
(*h*) Ord. XX. r. 1.
(*i*) Ord. XXI. r. 8.
(*k*) Ord. XXIII. r. 2.
(*l*) *Ibid.* r. 3.
(*m*) Ord. XX. r. 1; *Fawcus* v. *Charlton* (1883), 10 Q. B. D. 516.
(*n*) Ord. XIX. r. 2.
(*o*) Ord. XX. r. 6.
(*p*) *Ibid.* r. 7.

every reply to a counterclaim, is to deal specifically with every allegation of fact that is not admitted; a mere general denial not being sufficient (*q*), except as regards damages (*r*), and except that (as already mentioned) a simple joinder of issue operates as a general denial. Denials of fact are to be substantial and not evasive; denials *modo et formâ* (if standing alone) being deemed evasive (*s*). Where a contract is alleged, a bare denial thereof operates to deny the fact only, and not to put in issue the validity thereof on any ground of law (Order XIX. rule 20); and where the action is for a debt or liquidated demand, the defendant may not deny the debt generally, but must deny some matter of fact (*t*).

And as regards particular pleas, it is provided as follows. In an action for recovery of the possession of land, it is sufficient for the defendant to plead that he is in possession of the land by himself or his tenant without pleading his title (*u*), unless where the title is equitable only, or the defence is on equitable grounds. All such special defences as rest upon the Statutes of Limitation (*x*), and all special defences that rest on the Statute of Frauds (*y*), and all releases (*z*) and the like (*a*), are to be specially pleaded. Moreover, fraud must be pleaded with great preciseness, particulars of the alleged fraud being stated in the pleadings or else separately supplied (*b*); and the alleged waiver of,—or any breach of non-performance of,—any condition precedent, must be specifically alleged (*c*).

The plaintiff may, before the delivery of the defendant's defence, or at any time before replying thereto, wholly discontinue his action, by delivering to the defendant a

(*q*) Ord. XIX. r. 13.
(*r*) *Ibid.* r. 17.
(*s*) *Ibid.* r. 19.
(*t*) Ord. XXI. rr. 1, 2, 3.
(*u*) *Ibid.* r. 21.
(*x*) Ord. XIX. r. 15.
(*y*) *Ibid.*
(*z*) *Ibid.*
(*a*) *Catling* v. *King* (1877), 5 Ch. D. 660.
(*b*) Ord. XIX. rr. 6, 7.
(*c*) *Ibid.* r. 14.

notice of discontinuance (*d*). And he may, by leave, do the like at any subsequent stage of the action (*e*) ; but the leave to discontinue is not granted as a matter of course (*f*). The discontinuance does not, in general, prejudice any subsequent action (*g*) ; and the counterclaim (if any) may still be proceeded with (*h*). Also, in lieu of discontinuing the whole action, the plaintiff may withdraw part only of the cause of action, doing so without leave before the defendant has delivered his defence, or at any time before reply if a defence has been delivered (*i*), but doing so only with leave and upon terms at any subsequent stage of the action. And the plaintiff in any case pays the defendant's costs of the matter withdrawn (*k*) ; and for such costs, unless paid within four days after taxation, the defendant may sign judgment (*l*).

Should the plaintiff fail to deliver a statement of claim when bound to do so, the defendant may get an order for judgment dismissing the action (*m*) ; and, on the other hand, if the defendant should fail to deliver his defence, the plaintiff may, in certain cases, have such judgment as he is entitled to on his statement of claim (*n*), and in other cases, he may, according to the nature of his claim in the action, have judgment for the recovery of the possession of the land (*o*), with or without mesne profits and damages (*p*) ; or judgment for the value of the goods detained, with or without pecuniary damages (*q*) ; or judgment for pecuniary damages (*r*) ; or judgment for the amount of the debt or of the liquidated damages, whether the writ is specially indorsed or not (*s*). How-

(*d*) Ord. XXVI. r. 1.
(*e*) *Ibid.*
(*f*) *Stahlschmidt* v. *Walford* (1879), 4 Q. B. D. 217.
(*g*) Ord. XXVI. r. 1 ; *The Kronprinz* (1887), 12 App. Ca. 256.
(*h*) Ord. XXI. r. 16.
(*i*) Ord. XXVI. r. 1.
(*k*) *Ibid.* r. 1.
(*l*) *Ibid.* r. 3.
(*m*) Ord. XXVII. r. 1.
(*n*) *Ibid.* r. 11.
(*o*) *Ibid.* r. 7.
(*p*) *Ibid.* r. 8.
(*q*) *Ibid.* r. 4.
(*r*) *Ibid.*
(*s*) *Ibid.* r. 2.

ever, any judgment obtained by default may be set aside upon terms, if it be shown that it ought not to stand (*t*).

In many actions, certain interlocutory proceedings are taken before the trial. For instance, if the pleadings do not contain any details or information which are or is necessary to enable the opposite party to ascertain what case he has to meet, an order for *particulars* giving the necessary details or information may be obtained (*u*).

So in all cases where a party has or is likely to have in his possession documents or books relating to the matters in dispute, the opposite party may obtain an order for *discovery* (*x*); that is to say, an order that the party do state on oath what documents and books relating to the matter he has, or has had, in the possession, custody, or power of himself or of any solicitor or agent for him (*y*). So again, in cases where it appears reasonable, a party may obtain leave by order to administer *interrogatories* to his opponent (*z*). These interrogatories are questions put for the purpose of getting admissions which may save the expense of calling evidence at the trial, or information which may enable the party to ascertain what case he has to meet.

III. *The Trial and Evidence.*—So soon as it is ascertained by the pleadings or otherwise what are the issues of fact in dispute in the action, it becomes necessary to determine, on which side the truth lies; and for this purpose, there is the *trial*, when the *evidence* is gone into. And the trial may be either before a judge and jury; or before a judge; or before an official or special referee (*a*).

(*t*) Ord. XXVII. r. 15.

(*u*) Ord. XIX. rr. 6—8.

(*x*) Ord. XXXI. r. 12.

(*y*) The opposite party is entitled to inspect and take copies of or extracts from all the documents and books disclosed (Ord. XXXI. r. 15).

(*z*) Ord. XXXI. r. 1.

(*a*) Ord. XXXVI. rr. 2—6.

(1) Trial *by a Judge with a Jury.*—Trial by *jury* (called also trial *per pais*, or by the country) is a form of trial that hath been used time out of mind in this country (*b*). And, first, there is a trial *at bar*, that is, a trial by jury before two or more of the judges sitting in *banc*. But this form of trial is comparatively rare, and takes place only in causes of great difficulty, or where the Crown is concerned in interest, and insists on its right to have the cause so tried ; for, as between private parties, this mode of trial is allowed, only by special permission of the court (*c*). The more usual form of trial by jury is that which takes place, either before a judge at the sittings in Middlesex (*d*), or before a judge or commissioner of assize upon circuit (*e*).

(*b*) Blackstone (vol. iii. p. 349) considers trial by jury as having been "universally established "among all the northern nations"; and he says, that it is mentioned in England as early as in the laws of Ethelred (for which he cites Wilk. *Ll. Anglo-Sax.* 117), but that its first establishment among us is unknown. But it is exceedingly doubtful, whether trial by jury did actually exist among us at any time before the Norman Conquest (Hallam, *Mid. Ag.* vol. ii. p. 396, 7th ed. ; Reeves, *Hist. Eng. Law*, vol. i. pp. 24, 83) ; and most probably, we owe the germ of this, (as of so many other of our institutions,) to the Normans. In the time of Henry the Third, trial by jury had taken among us, (in substance,) the shape which it now wears ; but its rudiments appear as early as the reign of Henry the Second. And indeed the particular species of it, called the *grand assize*, which was appropriate to the trial of questions of *mere right*, appears to have been established by a positive law of the last-mentioned monarch (Glanv. l. 2, ch. 7).

(*c*) Law Terms Act, 1830, s. 7 ; *Dimes* v. *Lord Cottenham* (1850), 5 Ex. 311 ; 1 L. M. & P. 318 ; Ord. XXXVI. r. 9 ; *Dixon* v. *Farrer* (1886), 18 Q. B. D. 43.

(*d*) By Order in Council (22nd May, 1883), all London actions were directed to be tried in Middlesex simply ; and although, by the Judicature Act, 1890, the sittings in London for the trial of London jury cases were revived, these cases are now tried in Middlesex.

(*e*) Upon judgment by default, in an action for unliquidated damages, the amount of damages is usually *assessed* by a jury under a *writ of inquiry* ; and the assessment is usually before the under-sheriff (or in London before one of the sheriff's *secondaries*).

When an issue or issues of fact have been joined, *notice of trial* must be given by one or other of the parties before the action can proceed further; and with regard to this, it has been provided, that the plaintiff may, with his reply, or at any time after the *close of the pleadings*, give such notice, specifying therein the mode of trial ordered on the summons for directions (*f*). And if, for a period of six weeks from the close of the pleadings, he fails so to do, the defendant may do so (*g*). The notice of trial, by whichever party given, is a ten days' notice, unless the opposite party is specially ordered to take "short," or four days' notice (*h*). The next step is to *enter the cause for trial*, two copies of the whole pleadings in the action being at the same time delivered to the proper officer (*i*). The pleadings so delivered constitute the *Nisi Prius Record*.

The jury to try the issue or issues of fact raised by the pleadings, is constituted as follows. A precept is issued, directing the sheriff to summon a sufficient number of jurors for the trial of all issues which shall come on for trial at the next assizes, or (as the case may be) at the next sittings of the court; and a printed panel or slip of parchment, containing the names of the jurors summoned in obedience to such precept, is made out by the sheriffs, and kept open for public inspection, the panel containing the names, abodes, and additions of a number of jurors,

(*f*) Ord. XXXVI. rr. 2, 6. It is to be noticed, that either party may insist on matters of fact being tried before a jury, when the action is for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage (Ord. XXXVI. r. 2); but that, in other actions in the King's Bench Division, the action is now frequently tried without a jury, subject always to the control of the judge, who may, by special order, direct the mode of trial (Ord XXXVI. rr. 5, 6).

(*g*) Ord. XXXVI. r. 12. A trial thus brought on by the defendant used, at one time, to be called a *trial by proviso*; as to which see 3 Bl. Com. 357.

(*h*) Ord. XXXVI. r. 14. Where the trial is under Ord. XVIIIA. (*i.e.*, without pleading), the notice of trial is required to be a twenty-one days' notice.

(*i*) Ord. XXXVI. r. 30.

not being less than forty-eight nor exceeding seventy-two, taken from the *jurors' book*. This book, by the Juries Act, 1825 (6 Geo. IV. c. 50), as amended by the Juries Act, 1870 (33 & 34 Vict. c. 77), is annually made out in each county, from lists returned, from each parish, by the churchwardens and overseers, of persons therein qualified to serve as jurors, and who are not *exempted* from so serving (*j*). But inasmuch as it is in the option, either of plaintiff or defendant, to have the action tried by a *special* jury, that is to say, a jury consisting of persons who are of a certain station in society, such as esquires, bankers, merchants, and the like (*k*), the sheriff is further directed to summon a sufficient number of special jurymen ; and the mode of obtaining a special jury is now the same, both in *town* causes and in *country* causes (*l*). Formerly, however, as regards town causes, or causes to be tried at the Middlesex sittings, the practice was somewhat different. For, where any cause was to be tried by a special jury, due notice thereof was given, and recourse was thereupon had by the sheriff to the *special jurors' list*, a list annually made out of persons qualified to act as special jurors (*m*) ; and tickets corresponding with the names of the jurors on this list being put into a box and shaken, the officer took out forty-eight (*n*). To any of these either party might object for incapacity, and (supposing the objection to be established) another name was substituted, and these forty-eight names having at a subsequent period been reduced to twenty-four, by striking

(*j*) As to these *exemptions*, see Juries Act, 1870, s. 9 ; and Judicature Act, 1873, s. 77.

(*k*) See Juries Act, 1870, s. 6 ; *Vickery* v. *London, Brighton, etc. Rail. Co.* (1870), L. R. 5 C. P. 165.

(*l*) No special jury need be summoned by the sheriff, unless he has received notice to do so from one of the parties ; and the fact of being marked as a special juror, is no exemption from the liability to serve on common juries.

(*m*) Juries Act, 1825, s. 31.

(*n*) Common Law Procedure Act, 1852, s. 110 ; and (as to the number forty-eight) Special Juries Act, 1898.

off such as each party should in his turn wish to be removed, the twenty-four were accordingly summoned, and their names were placed upon a panel (*o*). This method was commonly described as *striking* a special jury (*p*). But, by the Juries Act, 1870 (33 & 34 Vict. c. 77), it has been enacted, that it shall for the future be resorted to only in compliance with the order of the court or a judge (*q*).

Lists are kept of all the actions entered for trial. In these lists the actions are divided into jury actions and non-jury actions, according as they are to be tried with, or without, a jury. In Middlesex, these lists are printed and published from time to time, so that the position of any action can at any time be ascertained.

Let us now suppose the action to be called on in court, both parties appearing (*r*). The pleadings as delivered are handed to the judge to peruse ; and, in the meantime, the jury is being *called* and *sworn*. The calling of the jury consists in successively drawing out of a box, into which they have been previously put, the names of the jurors on the jury panel, and calling them over in the order in which they are so drawn (*s*) ; and the twelve persons whose names are first called, and who appear, are sworn as the jury, excepting that, where, before the trial, an order has been obtained, directing that a *view* shall be had, by certain of the jurors on the panel, of the messuages or lands in question, the six or more jurors (agreed on by the parties or else nominated by the sheriff) who have viewed the premises, are first sworn (*t*).

(*o*) Common Law Procedure Act, 1852, s. 110.

(*p*) Juries Act, 1825, s. 32.

(*q*) Juries Act, 1870, ss. 16—18.

(*r*) If, at the trial, the plaintiff appears, but not the defendant, the plaintiff may prove his claim as far as the burthen of proof lies on him, and then ask for judgment (Ord. XXXVI. r. 31); and on the other hand, if the defendant appears, but not the plaintiff, the defendant may ask for judgment dismissing the action (*ibid.* r. 32).

(*s*) Juries Act, 1825, s. 26; Common Law Procedure Act, 1852, ss. 108, 110 ; Juries Act, 1870, s. 16.

(*t*) The Judicature Acts have provided, that a *view* of the pro-

After the jurors have appeared, and before they are sworn, they are liable to be *challenged* (*u*) by either party, such challenges being of two sorts, either to the *array*, or to the *polls*. A challenge to the array is to the whole panel; and it may be on account of some default in the officer who arrayed the panel, as if he be himself a party to the suit, or related by blood or affinity to either of the parties. Also, though there be no personal objection against the sheriff, yet, if he arrays the panel at the nomination or under the direction of either party, this is a good cause of challenge to the array (*x*). And, again, a challenge to the array may be either by way of *principal* challenge, or by way of challenge *to the favour*; the former being on one of the direct grounds above described, the latter, on grounds that imply only a probability of bias or partiality, one example instanced in the books being where the son of the sheriff had married the daughter of the adverse party (*y*). And there seems to

perty may be had,—either by the judge himself (Ord. L. r. 4); or by the jury (Ord. L. r. 5); or by the parties (Ord. L. r. 3); or by the official referee (Ord. XXXVI. r. 48).

(*u*) In practice the right of challenge is seldom, if ever, exercised in civil actions. Any objection to a particular juryman is usually, by consent of the counsel on both sides, mentioned privately to the officer who calls the jury; and that particular juryman is not called, or is asked to withdraw.

(*x*) Formerly, the array might have been challenged for want of *hundredors*, an objection founded on the early practice of our law, by which the jurors, in the origin of the institution of trial by jury, were summoned altogether *de vicineto*, and were indeed in the nature of *witnesses*, rather than of judges. But the necessity for hundredors has been abolished (4 & 5 Anne (1705), c. 3; Juries Act, 1825, s. 13). The array might also formerly have been challenged, if an *alien* were party to the proceedings, and if (on the fact being duly noticed) the sheriff did not return a jury *de medietate linguæ*, that is, a jury one half of which consisted of aliens, supposing so many to be found in the place. But this jury *de medietate* was done away with (in civil actions) by the Act of 1825, ss. 3, 47; and (in other cases) by the Naturalization Act, 1870, s. 5.

(*y*) Co. Litt. 156 a.

be this practical difference between them, that the first, if sustained in point of fact, must be allowed as of course, while the allowance of the latter is matter of judgment and discretion only (*z*). If the challenge be controverted by the opposite party, it is to be left to the determination of two *triors* appointed by the court (*a*) : and if these decide in favour of the objection, the array is quashed, and a new jury impanelled by the coroner (*b*), who in this, as in some other instances, acts as a substitute for the sheriff, where exception on any ground is taken to the latter.

[(2) Challenges to the polls (*capita*, *i.e.*, individuals) are exceptions taken to particular jurors ; and such challenges are on four accounts,—*propter honoris respectum ; propter defectum ; propter affectum ;* and *propter delictum* (*c*) :—

(a) *Propter honoris respectum*,—*e.g.*, if a lord of parliament be impanelled on a jury, he may be challenged by either party, just as he may excuse himself, as exempted by law (*d*).

(b) *Propter defectum*,—*e.g.*, if a juryman be an alien born, and neither domiciled in this country nor naturalized, this is defect of birth and ground for challenge (*e*). And we may here notice also the defect of sex, no female being capable of serving on a jury (*f*), and the defect of age,

(*z*) Co. Litt. 156a ; 3 Bl. Com. 363.

(*a*) A principal challenge may be tried by the court itself without the intervention of triors (*Mayor of Carmarthen* v. *Evans* (1842), 10 M. & W. 274).

(*b*) *Newman* v. *Edmunds* (1611), 1 Bulst. 113 ; 2 Hale, P. C. 275 ; *R.* v. *Edmonds* (1821), 4 B. & Ald. 471. If any exception be taken to the *coroner*, the jury is to be arrayed by two persons named by the court and sworn to the discharge of their duty, which two persons are called *elisors* or electors ; and no challenge is allowed to their array (3 Bl. Com. 355 ; Fortesc. *de Laud.* ch. 25 ; Co. Litt. 158).

(*c*) Co. Litt. 156 b.

(*d*) Act of 1825, s. 2 ; Act of 1870, *in sched.*

(*e*) Act of 1825, s. 3 ; *R.* v. *Sutton* (1828), 8 B. & C. 417.

(*f*) Except, of course, in the case of a jury of matrons, upon the writ *de ventre inspiciendo* (Act of 1825, s. 1 ; *post*, vol. IV. bk. VI. chap. XXI.).

[every juror requiring to be between twenty-one and sixty years of age. But the principal deficiency is defect of estate, the qualification of an ordinary or "common" juror in respect of estate, which now depends on the Juries Act, 1825 (6 Geo. IV. c. 50), being, that he must have, within the county in which he resides and in which the action is to be tried, in his own name, or in trust for him, 10*l.* by the year, above reprises, in lands or tenements of freehold, copyhold, or customary tenure, in fee simple, fee tail, or for the life of himself or some other person, or else 20*l.* by the year, above reprises, in lands or tenements, held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives, or else he must be a householder, rated or assessed to the poor rate, or to the inhabited house duty, in Middlesex, on a value of not less than 30*l.*, or (in any other county) on a value of not less than 20*l.* And if he does not possess one or other of these qualifications, it is a ground of challenge (*g*). As regards towns corporate and counties corporate having a jurisdiction of their own, and also as regards London, the Act provides a somewhat different qualification (*h*).

(c) *Propter affectum*,—*i.e.*, for suspicion of bias or partiality ; and the challenge on this ground may be either a *principal* challenge or a challenge *to the favour*. A *principal* challenge alleges that the juror is of kin, to either party, within the ninth degree (*i*), or that he has been arbitrator on either side, or that he has an interest in the cause (*k*), or that there is an action depending between him and the party, or that he has taken money for his verdict, or that he has formerly been a juror in the same cause, or that he is the master, servant, counsellor, steward,

(*g*) 6 Geo. 4, c. 50, ss. 1, 27.
(*h*) *Ibid.* s. 50.
(*i*) *Onions* v. *Naish* (1819), 7 Price, 203 ; *Hewitt* v. *Fernley*, *ib.* 234.
(*k*) *Bailey* v. *Macaulay* (1849), 13 Q. B. 829.

[or solicitor of the opposite party, or belongs to the same society or corporation (*l*). But a challenge to the *favour* merely suggests an objection or probable suspicion founded on (*e.g.*) acquaintance with the parties (*m*); and these challenges are determined, like challenges to the array, by *triors* (*n*).

(d) *Propter delictum*,—that is to say, for conviction of some crime or misdemeanor, as for treason, felony, or any infamous crime, unless the juror shall have obtained a free pardon (*o*).

If a sufficient number of jurors do not appear, or if, by means of challenges or exemptions, a sufficient number of unexceptionable ones do not remain, either party may pray a *tales* (*i.e.*, *so many* more as were wanted, *tales quales*); and for this purpose, a writ of *decem tales*, *octo tales*, and the like, used, by the common law, to issue to the sheriff (*p*).] But, by the Juries Act, 1825, section 37, the judge, trying the cause, is empowered, at the request of either party, to award a tales *de circumstantibus* (*q*). However, in the case of common jurors, of whom seventy-two are usually returned on the same common jury panel, it happens, of course, but rarely, that the whole are exhausted so as to make a *tales* necessary; and, in the case of special jurors, the deficiency is to be made up in the first place from the common jury panel, if a sufficient number can be found, and if not, then by a tales *de circumstantibus* (*r*).

The necessary number of twelve qualified persons being obtained, they are then sworn. Christians are sworn on

(*l*) *Williams* v. *Great Western Rail. Co.* (1858), 3 H. & N. 869.

(*m*) Finch, L. 401.

(*n*) Co. Litt. 158. It is said, that a principal challenge to the polls may, like a principal challenge to the array, be tried by the *court*, without the intervention of triors (Arch. *Practice*, 14th ed. p. 621).

(*o*) Act of 1825, s. 3; Act of 1870, s. 10.

(*p*) 3 Bl. Com. 365.

(*q*) F. N. B. 166.

(*r*) *Catliff* v. *Bourne* (1838), 2 Moo. & R. 100; *British Museum* v. *White* (1828), 3 Car. & P. 289.

the New Testament, Jews on the Pentateuch, and others according to their religious belief,—"well and truly to try "the issue between the parties, and a true verdict to give "according to the evidence." They may affirm instead of being sworn (*s*).

The jury being now ready to hear the cause, *the pleadings are opened* (*i.e.*, their effect is briefly stated) by the plaintiff's counsel—the junior counsel if there are two. The counsel for the plaintiff (*t*), or (in certain cases) counsel for the defendant, when the burden of proving the issue is on the defendant (*u*), makes his opening statement; in which he briefly informs the jury, who are the parties, what the kind of action, the claim which has been made by the plaintiff, the defence which has been set up, showing upon what point or points issues of fact have been joined, which are to be by them determined. He then proceeds to explain to the jury the nature of the case he proposes to establish, and the evidence intended to be produced in its support. After the opening statement is finished, the evidence is produced. And when this has been done, the counsel on the other side opens the adverse case; and supports it, if its nature so require, by evidence, which he is also entitled to sum up. And then the party who began is heard by way of reply; but no reply is allowed, save only by the Crown, unless evidence has been given in answer to the case first stated (*x*).

(*s*) Oaths Acts, 1838 and 1888.

(*t*) In all actions for *unliquidated damages*, the plaintiff begins—though the affirmative of the issue be on the defendant (*Mercer* v. *Whall* (1845), 5 Q. B. 447; *Cooper* v. *Wakley* (1828), Moo. & M. 248).

(*u*) *Calder* v. *Rutherford* (1822), 3 Brod. & Bing. 302; *Evans* v. *Birch* (1811), 3 Camp. 10; *Williams* v. *East India Co.* (1802), 3 East, 192.

(*x*) The Common Law Procedure Act, 1854, s. 18, has provided, that the party who begins, or his counsel, shall be allowed (in the event of his opponent not announcing at the close of the plaintiff's case his intention to adduce evidence) to address the jury a second time at the close of

The *evidence* at the trial is, in general, *oral* evidence; but there may, of course, according to the nature of the action, be written evidence as well, such as deeds, records, and the like. And with respect to witnesses, there is a process to compel their attendance, by writ of *subpœna ad testificandum* (*y*); which commands them (laying aside all excuses, and on pain of forfeiting 100*l.*) to appear at the trial, and give their evidence. Such writ may contain also a clause of *duces tecum*, requiring them to bring, at the same time, all such deeds or writings, in their possession or power, as the party who issues the subpœna may think material for this purpose. In the event of the non-attendance of the witness so subpœnaed, and his inability to show any lawful ground of excuse, (such as that of dangerous illness,) he is considered as having committed a contempt of court, and is liable to an attachment (*a*); and an action will also lie against him, at the suit of the party damnified by his absence (*b*). But no witness is bound to appear in court, unless his reasonable expenses for the whole period of his attendance, *eundo*, *morando*, *et redeundo*, are tendered him; nor if he there appears, is he bound to give evidence, till such charges are actually paid him.

If it be ascertained beforehand that a witness required at the trial will be unable to attend, by reason of sickness or infirmity, or through his absence in parts beyond the jurisdiction, the court is empowered to make an order that his evidence be taken on commission, or before one of the barristers appointed as examiners, or before a person

such case, for the purpose of summing up the evidence he has adduced; and the party on the other side, or his counsel, shall be allowed to open his case, and also to sum up his evidence (if any).

(*y*) *O'Flanagan* v. *Geoghehan* (1864), 16 C. B. (N.S.) 636.

(*a*) *Chapman* v. *Davis* (1841), 1 Dowl. (N.S.) 239; Ord. XXXVII. r. 8; *Connell* v. *Baker* (1885), 29 Ch. D. 711.

(*b*) *Davis* v. *Lovell* (1839), 1 H. & H. 451; *Couling* v. *Coxe* (1848), 6 D. & L. 399.

specially appointed for the purpose (*c*) ; and the evidence so taken may be afterwards used at the trial, if the witness be then dead, or if he continues ill and infirm, or absent beyond the jurisdiction (*d*). But otherwise, the deposition cannot in general be used, without the consent of the party against whom it is offered. Also, any particular fact or facts may, for sufficient reasons, be ordered to be proved by affidavit ; and, in such a case, the affidavit will be read at the trial on such conditions as may then appear reasonable (*e*). Also, any witness whose attendance in court ought, for any sufficient cause, to be dispensed with, may be examined before a commissioner or examiner ; unless the court or judge shall be satisfied that the other party *bonâ fide* desires the witness to be produced in court, for the purpose of cross-examining him, and also that he can be produced (*e*). And, where necessary for the purposes of justice, any person may be ordered to be examined upon oath, and his deposition filed and given in evidence, on such terms (if any) as shall be directed (*f*).

All witnesses, that have the use of their reason, are to be received and examined ; but not, of course, children too young to understand the nature of an oath, or adults who, through disease or from any other cause, are incapable (*g*). At one time, no *party* to the action was allowed to give evidence ; and persons *interested* in the testimony they were to give, however slight that interest might be (*h*),

(*c*) If the place where the examination is to be had is in any of the colonies or foreign dominions of the Crown, the commission is addressed to a court or judge there (Evidence by Commission Act, 1859 ; *Campbell* v. *Att. Gen* (1867), L. R. 2 Ch. App. 571). In the case of a witness in Germany and some other foreign countries, he is now examined on "letters of request," *i.e.*, a request that the foreign court may take the examination. (Ord. XXXVII. r. 6A, App. K., Nos. 37A and 37B.)

(*d*) Ord. XXXVII. r. 5 ; *Duke of Beaufort* v. *Crawshay* (1866), L. R. 1 C. P. 699.

(*e*) Ord. XXXVII. r. 1.

(*f*) *Ibid.* r. 5.

(*g*) 1 Stark. *Ev.* 81.

(*h*) *Doe* v. *Bramwell* (1842), 3 Q. B. 307.

were also incompetent to be heard, as witnesses on the side of the question to which their interest inclined, and persons who were *infamous*, that is, of such a character that they might be challenged as jurors *propter delictum* (*i*), were wholly inadmissible as witnesses. But the objection in all these cases now affects only the *credibility*, and not the *competency*, of the witness. For, by the Evidence Act, 1843, no person offered as a witness is to be excluded on the ground of incapacity from interest or from crime (*k*); and, by the Evidence Act, 1851, the *parties* themselves are both competent and compellable to give evidence, though not to answer questions tending to criminate themselves (*l*). By the Evidence Amendment Act, 1853, the wife or husband of any *party* is, in this respect, in the same position; subject only to this, that neither of them can be compelled to disclose anything which he or she has learned by communication from the other during the marriage. By the Evidence Further Admendment Act, 1869, the parties to any action for *breach of promise of marriage*, or to any proceeding *instituted in consequence of adultery*, were made competent to give evidence therein (*m*); and, by the Evidence Act, 1877 (*n*), on the trial of any proceeding (whether by indictment or otherwise) instituted for the purpose of trying or enforcing a *civil* right only, the defendant himself, and the wife or husband of such defendant, is an admissible witness, and is compellable to give evidence. There remained, however, still in force, one exception to the general rule: viz., that no one should be *sworn* who professed not to believe in the existence of a God by whom perjury was punished; but the Evidence Further Amendment Act, 1869, provided, that if any

(*i*) 3 Bl. Com. 370.

(*k*) *Udal* v. *Walton* (1845), 14 M. & W. 254; *Att.-Gen.* v. *Hitchcock* (1847), 1 Exch. 91.

(*l*) *The Queen* v. *Payne* (1872), L. R. 1 C. C. R. 349; *Reg.* v. *Slator* (1881), 8 Q. B. D. 267.

(*m*) *In re Rideout's Trusts* (1870), L. R. 10 Eq. 41; *Bishop of Norwich* v. *Pearse* (1868), L. R. 2 Adm. & Ecc. 281; *M.* v. *D.* (1885), 10 P. D. 175.

(*n*) 40 & 41 Vict. c. 14.

person called to give evidence in any court of justice, whether in a civil or criminal proceeding, should object to take an oath, or should be objected to as incompetent to take an oath, such person should, if the presiding judge was satisfied that the taking of an oath would have no *binding effect on his conscience*, make a solemn promise and declaration that his evidence should be true, and that if he should, nevertheless, wilfully and corruptly give false evidence, he might be convicted of perjury. And now, the Oaths Act, 1888 (*o*), section 1, has provided generally, that every person, when objecting to be sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation instead of taking the oath, in all places, and for all purposes, subject to the like liability to be prosecuted for perjury as in the case of falsely swearing.

The oath of a witness, or his affirmation in lieu thereof, is to speak "the truth, the whole truth, and nothing but the truth"; and the oath is, in general, taken upon the New Testament, or, in the case of persons who do not profess the Christian faith, the oath is administered in such form as is appropriate to their own creed, if any (*p*). And, now, under the Oaths Act, 1888 (*q*), section 5, anyone desiring to do so may swear with uplifted hand.

A witness is not bound to answer any question which tends to expose him to any penalty (*r*) or forfeiture (*s*);

(*o*) 51 & 52 Vict. c. 46.

(*p*) *Omychund* v. *Barker* (1744), 1 Atk. 21; *R.* v. *Whitehead* (1866), L. R. 1 C. C. R. 33.

(*q*) 51 & 52 Vict. c. 46. See also 52 & 53 Vict. c. 10 (Commissioners for Oaths Act, 1889), consolidating and amending the law as to officers (usually solicitors) before whom oaths may be taken, or affirmations made; which last mentioned Act has since been amended by the 53 & 54 Vict. c. 7, and 54 & 55 Vict. c. 50.

(*r*) Evidence Act, 1851, s. 3; *Bradlaugh* v. *Edwards* (1861), 11 C. B. (N.S.) 377; *The Queen* v. *Boyes* (1861), 1 B. & S. 311.

(*s*) *Fisher* v. *Ronalds* (1852), 12 C. B. 762; *Atherley* v. *Harvey* (1877), 2 Q. B. D. 524; *Allhusen* v. *Labouchere* (1878), 3 Q. B. D. 654.

but he cannot refuse to answer a question relevant to the matter in issue, merely on the ground that his answer may tend to establish a *debt* or other *civil* liability against him (*t*).

A counsel or solicitor is not bound, or even at liberty, to divulge the secrets of the cause with which he has been entrusted (*u*), nor can official persons be called upon to disclose any matter of state, the publication of which might be prejudicial to the community (*x*); and no questions are permitted to be asked which tend to the discovery of the channels through which information has been given to the officers of justice in criminal prosecutions (*y*). But, with these exceptions, the law compels all professional persons, whether physicians, surgeons, divines, or others, to divulge facts, if relevant to the issue, with which they have become professionally acquainted; and will not allow such persons,—or even a servant or private friend,—to withhold a relevant matter, though of the most delicate nature, and communicated to him or her in the strictest confidence (*z*).

A party producing a witness is not, even though in the opinion of the judge he shall prove to be adverse, allowed to impeach his credit by general evidence of bad character, although he may, in such a case, contradict him by other evidence, and, by leave of the judge, he may prove that the witness has made, at some other time, a statement inconsistent with his present testimony. But, to protect the witness, in such a case, against unfair surprise, it is necessary, before such latter proof be given, that the circumstances of the supposed former statement, so far as

(*t*) Witnesses Act, 1806.

(*u*) *R.* v. *Duchess of Kingston* (1776), 20 St. Tr. 355; *Weeks* v. *Argent* (1847), 16 M. & W. 817; *R.* v. *Cox* (1884), 14 Q. B. D. 153.

(*x*) *Beatson* v. *Skene* (1860), 5 H. & N. 838.

(*y*) *Hardy's Case* (1794), 24 St. Tr., at p. 816; *Attorney-General* v. *Briant* (1846), 15 M. & W. 169.

(*z*) *Wilson* v. *Rastall* (1792), 4 T. R. 753; *Vaillant* v. *Dodemead* (1743), 2 Atk. 524.

is sufficient to designate the particular occasion, shall be mentioned to him (*a*).

One witness, if credible, is *sufficient* evidence of any single fact, although undoubtedly the concurrence of two or more corroborates the proof (*b*); and our law considers, that there are many transactions to which only one person is privy, and therefore does not, as a rule, demand the testimony of two, as the civil law universally required. However, in certain cases, corroborative testimony is required, either by the common law (*c*) or by the express provision of the statute law (*d*).

After the examination of the witness by the party for whom he is called, which is termed his *examination in chief*, he is subject to *cross-examination* by the opposite party, which being concluded, he may then be *re-examined* by the party calling him, *with reference to any matter arising out of the cross-examination* (*e*). Upon his cross-examination, the witness may be asked, if he has not given a contrary account of the same matter on a former occasion; and if he does not distinctly admit this, proof may then be given, *aliunde*, that he has done so (*f*). But if it is intended to contradict him by a former statement made by him in *writing*, his attention must first be called to those parts of the writing which are to be used for the purpose of contradiction (*g*). Also, although the witness cannot be cross-examined as to particular acts of misconduct, for that would be to engraft another trial upon the trial which is before the jury (*h*), yet he may be questioned as to

(*a*) Common Law Procedure Act, 1854, s. 22; *Greenough* v. *Eccles* (1859), 5 C. B. (N.S.) 786.

(*b*) *Hill* v. *Wilson* (1873), L. R. 8 Ch. App. 888; *Shillito* v. *Hobson* (1885), 30 Ch. D. 396.

(*c*) *Finch* v. *Finch* (1883), 23 Ch. D. 267.

(*d*) Evidence (Further Amendment) Act, 1869.

(*e*) *Prince* v. *Samo* (1838), 7 A. & E. 627.

(*f*) Common Law Procedure Act, 1854, s. 23.

(*g*) Sect. 24; Criminal Procedure Act, 1865, ss. 4, 5.

(*h*) *Queen's Case* (1820), 2 Brod. & Bing. 299; *Carpenter* v. *Wall* (1840), 11 A. & E. 803.

whether he has not been convicted of any felony or misdemeanor. And if he denies the fact, or refuses to answer, the conviction may be proved (*i*), that being usually done by producing a certificate of the conviction. Moreover, the credit of the witness may be impeached, not only by means of cross-examination, by proving previous contradictory statements, and by evidence reflecting on his general bad character, but also by calling witnesses to disprove, or rebut, such of the facts stated by him as are material to the issue (*k*).

No evidence is necessary, as to any matters of which the court takes judicial notice (*l*), or as to matters which the law presumes (*m*), or with respect to matters which the opposite party has at any time admitted to be true (*n*), or which are admitted on the pleadings (*o*); and evidence is, of course, always dispensed with, as to matters upon which an admission has been made for the express purpose of being used at the trial. And with reference to this latter subject, either party may give notice that he admits the truth of the whole or any part of the case of the opposite party (*p*); and either party may call on the opposite party to admit any *document*, saving all just exceptions. In case of refusal or neglect to admit, the costs of proving the case or document are to be paid by the party so called upon and refusing, whatever may be the result of the action, unless the judge certifies, that the refusal to admit was reasonable: and, on the other hand, no costs of proving any document will, in general, be

(*i*) Common Law Procedure Act, 1854, s. 25.

(*k*) Taylor, *Evidence*, s. 1438.

(*l*) Evidence Act, 1845; Evidence Act, 1851, ss. 7—14; Criminal Procedure Act, 1851, s. 22.

(*m*) *Saye and Sele Peerage* (1848), 1 H. L. C. 507; *Hargrave* v. *Hargrave* (1846), 9 Beav. 552.

(*n*) See *R.* v. *Gardner* (1810), 2 Camp. 513; *R.* v. *Topham* (1791), 4 T. R. 126; *Brickell* v. *Hulse* (1837), 7 A. & E. 454.

(*o*) *Smith* v. *Martin* (1842), 9 M. & W. 304; *Harris* v. *Gamble* (1878), 7 Ch. D. 877.

(*p*) Ord. XXXII. r. 1.

allowed to the party who neglects to give the usual notice to admit (*q*). Either party may call on the other to admit, for the purposes of the trial only, any specified *facts*, with or without qualifications; and, in case of his refusal or neglect to make the admission, he will in general have to bear the costs of proving the facts which he has refused to admit (*r*). As regards any documents which are referred to in the pleadings of either of the parties, the other party may give him a written *notice to produce* the same for inspection and perusal, and to permit a copy to be taken thereof, on pain of not being allowed at the trial to put such document in evidence (*s*). And either party may apply for an *order for the production of* any document in the possession or power of the other party, relating to any matter in question in the action (*t*).

No evidence is, of course, admissible except upon the point in issue (*u*). Thus, in an action of debt, where the defendant denies his bond, and alleges that it is not his deed, and the issue is whether it be his deed or no, he cannot give in evidence a release of the bond; for that does not destroy the bond, but shows only that it is discharged, and therefore does not support the issue, which is that the bond is not his deed. He should have pleaded the release, in order to have made such evidence admissible.

None but the best evidence may be adduced (*x*), that which is of a secondary kind not being admissible for that which is of a primary kind, where the primary evidence is accessible. Thus, the contents of a *private* deed or writing, as distinguished from a record or other public document (*y*), cannot be proved by a copy (still less by mere oral evidence), *if the writing be in existence, and*

(*q*) Ord. XXXII. r. 2.
(*r*) *Ibid.* r. 4.
(*s*) Ord. XXXI. r. 15; *Quilter* v. *Heatly* (1883), 23 Ch. D. 42.
(*t*) Ord. XXXI. r. 14.
(*u*) Bull. N. P. 298; *Hey* v. *Moorhouse* (1839), 6 Bing. N. C. 52.
(*x*) 3 Bl. Com. 368; Taylor, *Evidence*, 9th edit., p. 277.
(*y*) Evidence Act, 1851, s. 7.

can be procured by the party by whom the proof is offered (*z*). And if, as regards any private document, the law requires proof of its execution by a witness, a proof which is in general not required where the document is thirty years old, and comes out of the proper custody (*a*), the proof is by calling the attesting witness (*b*), or, if there are several attesting witnesses, by calling one of them, or else, by proving that such attesting witnesses are dead, or otherwise incapable of giving evidence (*c*), and then adducing secondary evidence of the execution, as by proof of their handwriting (*d*), which latter proof may even be given by an expert, upon a *comparison* of the signature in question with any admitted handwriting (*e*). And this rule was formerly of so strict a nature, that even the admission of the party against whom the instrument was produced, that it was executed by him, (unless such admission were made for the express purpose of the trial,) would not have sufficed to excuse the absence of the attesting witness (*f*); but now, by the Common Law Procedure Act, 1854, section 26, it is unnecessary to prove by the *attesting witness*, any instrument to the validity of which attestation is not required by law, so that such instrument may now be proved by admission or otherwise, as if there had been no attesting witness thereto. By the express provisions of particular statutes, certified extracts of certain *private* documents (*e.g.*, extracts under the Bankers' Books Evidence Act, 1879) (*g*), are made admissible in evidence; and documents of a *public* character may be proved by the

(*z*) *M'Gahey* v. *Alston* (1836), 2 M. & W. 206; *Jones* v. *Tarleton* (1842), 9 M. & W. 675; *Howard* v. *Smith* (1841), 3 Man. & Gr. 254; *Queen* v. *Llanfaethly* (1853), 2 El. & Bl. 940.

(*a*) Bull. N. P. 255; 2 Phill. on Ev., 10th ed., 245; *Doe* d. *Neale* v. *Samples* (1838), 8 A. & E. 151.

(*b*) *Gillett* v. *Abbott* (1838), 7 A. & E. 783.

(*c*) *Adam* v. *Kerr* (1798), 1 Bos. & P. 360.

(*d*) *Nelson* v. *Whittall* (1817), 1 B. & Ald. 19.

(*e*) Common Law Procedure Act, 1854, s. 27.

(*f*) *R.* v. *Harringworth* (1815), 4 M. & S. 350.

(*g*) 42 & 43 Vict. c. 11.

King's printer's copies thereof (*h*), or by copies thereof purporting to be printed under the superintendence of his Majesty's Stationery Office (*i*).

Where the circumstances are such as to entitle either party to give secondary evidence, then (*there being no degrees of secondary evidence*) he is at liberty to resort to any species of secondary evidence within his power (*k*); *e.g.*, he may give *oral* evidence of the contents of a document, and he is not bound to produce a *copy*, though in fact he should have one (*l*).

Hearsay, that is, the statement by a witness of what has been said or declared out of court by a person not a party to the suit, is not admissible as evidence; for our law deems it unsafe to rely upon the assertions of any one, unless he be called as a witness in the cause, and deliver his testimony under the sanction of an oath, and under the check which the power of cross-examination imposes (*m*). And this rule is so absolute, that the death of the person by whom the fact was so asserted out of court, and the consequent impossibility of producing him as a witness, makes no difference; and upon the same principle, no written entry or memorandum, made by a person not a party to the suit, can in general be admitted as evidence, even after his death. But in particular cases hearsay is admissible evidence. For, first, the declaration of a third

(*h*) Documentary Evidence Act, 1868 (31 & 32 Vict. c 37), amended by the Acts of 1882 and 1895.

(*i*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9); and see (as to entries in parish books) *Taylor* v. *Derey* (1837), 7 A. & E. 409; and (as to ancient manorial surveys) *Bridyman* v. *Jennings* (1699), 1 Ld. Raym. 734; and (as to a charity treasurer's books) *Doe* v. *Hawkins* (1841), 2 Q. B. 212; and (as to judgments) *Christy* v. *Tancred* (1842), 9 M. & W. 438; and (as to public books, not judicial) *Jewison* v. *Dyson* (1842), 9 M. & W. 540, and *Rowe* v. *Brenton* (1828), 8 B. & C. 737.

(*k*) *Doe* v. *Ross* (1840), 7 M. & W. 102.

(*l*) *Brown* v. *Woodman* (1834), 6 Car. & P. 206, *per* PARKE, J.

(*m*) *Wright* v. *Doe* (1837), 7 A. & E. 384; *Stobart* v. *Dryden* (1836), 1 M. & W. 615.

person may form part of the *res gestæ*, or may otherwise derive particular credibility from the circumstances under which it was made.—*e.g.*, if a question arises, whether a third person committed an act of bankruptcy by absenting himself from his house, his own declaration made at the time, that he so absented himself to avoid a creditor, is good evidence (*n*). Also the books of stewards (or other receivers), though strangers to the suit, are admitted in evidence after their death,—*so far as the entries therein tend to charge them with the receipt of moneys;* because such acknowledgments, having been made against their own interest, are entitled, on that ground, to particular weight (*o*). And declarations or statements in the nature of hearsay are admitted, where evidence of that description happens to constitute the natural and appropriate means of proof; as upon questions of pedigree, or of custom, public boundary, and the like (*p*). Also, a statement made by a third person will, usually, be receivable as evidence against a party to the action, if such party be proved to have been present when the statement was made, and to have heard its import; for it then becomes material to consider whether, by his language or demeanour on the occasion, it appeared to receive his assent (*q*).

Having said thus much on the *admissibility* of the evidence at the trial, we are now to consider the *effect* or *weight* of the evidence. Now the evidence may be either *positive* or *circumstantial*, by the former of which, we commonly understand a proof of the very fact in question, and by the latter, a proof of circumstances from which,

(*n*) 1 Stark. *Ev.* 48.

(*o*) *Higham* v. *Ridgway* (1808), 10 East, 109; 2 Sm. L. C. (11th ed.) 327; *Fursdon* v. *Clogg* (1842), 10 M. & W. 572; *Taylor* v. *Witham* (1876), 3 Ch. D. 605; see also *Price* v. *Torrington* (1703), 1 Salk. 285; 2 Sm. L. C. (11th ed.) 320.

(*p*) *Davies* v. *Lowndes* (1838), 5 Bing. N. C. 161; *Glenister* v. *Harding* (1885), 29 Ch. D. 985; *Haines* v. *Guthrie* (1884), 13 Q. B. D. 818.

(*q*) 1 Stark. *Ev.* 50.

according to the ordinary course of human affairs, the existence of the fact may reasonably be *presumed*. The strength of circumstantial or presumptive evidence varies, according to the nature and particular combination of the facts proved; for it may either be barely sufficient to decide the question, supposing no evidence to be offered to the contrary, or it may be so strong as to prevail even against the evidence offered on the other side, or so violent as not to admit of being repelled by any contrary evidence whatever. Presumptions of *fact* are of this class; but certain presumptions of fact are presumptions of *law* also, and in this latter case, there are certain accepted rules of law regarding them (*r*).

Summing up and Verdict.—When the evidence is completed on both sides, the judge sums up, recapitulating in greater or less detail (as he may deem necessary) the statements of the witnesses, and the contents of the documents adduced on either side, and commenting upon the manner in which they severally bear upon the issue, and giving his direction upon any matter of law that may arise, but leaving the jury to determine for themselves the credit and weight to which they are respectively entitled, and to decide whether, upon the whole, the preponderance of evidence is in favour of the plaintiff or the defendant (*s*).

(*r*) For example, the presumption of life (*Nepean* v. *Knight* (1837), 2 M. & W. 894; *Rhodes* v. *Rhodes* (1887), 36 Ch. D. 586); or of *seisin in fee* (*Jayne* v. *Price* (1814), 5 Taunt. 326; *Doe* v. *Williams* (1837), 2 M. & W. 749); or of *death without issue* (*Doe* v. *Wolley* (1828), 8 B. & C. 22; *Earl of Roscommon's Case* (1828), 6 C. & F. 97); or of *a reconveyance* (*Tenny* v. *Jones* (1833), 3 Moo. & S. 472; *Doe* v. *Williams* (1837), 2 M. & W. 749); or of *unity of possession* (*Clayton* v. *Corby* (1842), 2 Gale & D. 174); or of *authority as agent* (*Owen* v. *Barrow* (1804), 1 Bos. & P. (N.R.) 101; *Ward* v. *Evans* (1703), Salk. 442); or of *payment* (*Welch* v. *Seaborn* (1816), 1 Stark. Rep. 474; *Oswald* v. *Legh* (1786), 1 T. R. 270; *R.* v. *Stephens* (1757), 1 Burr. 434; *Egg* v. *Barnett* (1800), 3 Esp. 196); or of *due stamping* (*Doe* v. *Coombs* (1842), 3 Q. B. 687).

(*s*) As to the duty of the judge, with reference to leaving the case to the jury, or withdrawing it from their decision, see *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Ca. 193, and *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), *ibid.* 1155.

And the jury, after this summing up, if they express a wish so to do, are permitted to withdraw from the court to consider their verdict, and they are kept until they are agreed ; [and if they eat or drink at his charge for whom they afterwards find, that will vitiate the verdict (*t*). And if they speak with either of the parties (or their agents) after they have gone out of the jury box, or if they receive any fresh evidence in private, or if (to prevent disputes) they cast lots for whom they shall find, any of these circumstances will vitiate the verdict (*u*). In case the jurors do not agree before the judges are about to leave the assize town, though they are not to be threatened or imprisoned (*x*), yet the judges are not bound to wait for them, but may carry them round the circuit, from town to town, in a cart (*y*),]—an antient practice which was not at all unpleasant in the summer-time ; but in our own days, if the jury are unable, within a reasonable time, to agree upon their verdict, the jury is, with or without the consent of the parties, *discharged* by the judge (*z*), or a juror is *withdrawn* by consent of the parties, so that no verdict is given (*a*).

(*t*) *Hughes* v. *Budd* (1840), 8 Dowl. P. C. 315; *Morris* v. *Vivian* (1842), 10 M. & W. 137. By the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 23, the jury may (at the discretion of the judge) be allowed the use of a fire when out of court, and reasonable refreshment, to be procured at their own expense.

(*u*) In antient times, the principal remedy for reversal of a verdict unduly given was by writ of *attaint ;* which was a proceeding for setting aside, by a jury of twenty-four, the verdict of a jury of twelve. The effect of which was, that if the first jury were found to have given a false verdict, they incurred infamy, with imprisonment and forfeiture of their goods, which two latter punishments were, in course of time, commuted into a pecuniary penalty. This writ of attaint was as old as the reign of Henry the Second, and remained in force (though quite fallen out of use) till abolished by the Juries Act, 1825, s. 60.

(*x*) Mirrour, ch. 4, s. 24.

(*y*) 3 Bl. Com. p. 376, citing Lib. Ass. fol. 40, p. 11 ; and see 7 B. & S. 490; L. R. 1 Q. B. 305.

(*z*) *R.* v. *Charlesworth* (1861), 1 B. & S. 460.

(*a*) *Stodhart* v. *Johnson* (1790), 3 T. R. 657 ; *Harries* v. *Thomas* (1836), 2 M. & W. 38 ; *Gibbs* v. *Ralph* (1845), 15 L. J. Ex. 7.

The jury, when they are all agreed, return back into their places, and by their foreman, deliver in their verdict, for the plaintiff or (as the case may be) for the defendant; and if the verdict is for the plaintiff, they also, in actions where damages are claimed, at the same time assess the damages by him sustained in consequence of the injury of which he has made complaint (*b*).

If there should arise at the trial, upon the facts proved, any difficult matter of law, the jury may find a *special* verdict, this proceeding being founded on the 13 Edw. I. c. 30, s. 2 (*c*); and in a special verdict, the jury state the facts, as they find them to be proved, concluding conditionally, that if upon the whole matter the court should be of opinion that the issue ought to be found for the plaintiff, then they find for the plaintiff, and assess the damages accordingly, and if otherwise, then for the defendant. And there is also another method of finding a special verdict; and this is, when the jury find a verdict, generally, for the plaintiff, but subject to the opinion of the court on a *special case*, stated by the counsel on both sides, and containing a statement of facts mutually agreed upon.

In case the judge should, at the trial, mistake the law, either in directing the jury or otherwise, counsel on either side might formerly have required him to seal *a bill of*

(*b*) By the Civil Procedure Act, 1833, s. 28, the jury may, upon the trial of any issue or inquisition of damages, allow *interest*, at the current rate, upon debts from the time when they were payable, if made payable by a written instrument, and at a time certain; or if payable otherwise, then from the time when demand of payment shall have been made in writing, with notice that interest will be claimed (*Mowatt* v. *Lord Londesborough* (1854), 4 El. & Bl. 1; *Duncombe* v. *Brighton Club Company* (1875), L. R. 10 Q. B. 371). And (by sect. 29) they may give damages *in the nature* of interest, in actions of trover and trespass *de bonis asportatis*, over and above the value of the goods; and also, in actions on policies of assurance, over and above the money insured.

(*c*) *Mayor of Derizes* v. *Clark* (1835), 3 A. & E. 506.

exceptions to his ruling (*d*), which bill of exceptions was afterwards dealt with in the old court of Exchequer Chamber (*e*); and although bills of exceptions have now been abolished (*f*), yet the right of the parties to have the issues for trial properly submitted to the jury, with a full direction upon the law thereon, still continues, and may be enforced by an application to Court of Appeal (*g*).

Formerly the plaintiff was required to appear in court at the time when the jury delivered their verdict; and was liable to be *amerced* for a false claim (*h*), when he was nonsuited. In more modern times, it was still usual for a plaintiff, when he or his counsel perceived that he had not given evidence sufficient to maintain the issue, to be voluntarily *nonsuited* or to withdraw himself; whereupon the crier was ordered to *call the plaintiff*, and if neither he nor anybody for him appeared, the jurors were discharged, and the defendant had judgment of *nonsuit* and was entitled to his costs. After a nonsuit the plaintiff might have commenced the action again, which he could not have done after a *verdict*. Under the present practice, the plaintiff cannot elect to be nonsuited (*i*); but if the judge considers the evidence insufficient he, after hearing it (*k*), gives judgment for the defendant.

(2.) *Trial before a Judge.*—A trial before a judge of questions of fact as well as of law, dispensing with a jury,

(*d*) 13 Edw. I (1285), c. 31.

(*e*) The sufficiency in law of the facts proved at the trial to maintain the issues, might also formerly have been raised by a *demurrer to the evidence*; but that practice has been long discarded, in favour of an application for a new trial.

(*f*) Ord. XXXIX. rr. 3, 6; Ord. LII. r. 2.

(*g*) Judicature Act, 1875, s. 22; Appellate Jurisdiction Act, 1876, s. 17; *Cheese* v. *Lovejoy* (1877), 2 P. D. 161.

(*h*) Finch, L. 189, 252.

(*i*) *Fox* v. *Star Newspaper Co.*, [1898] 1 Q. B. 636.

(*k*) *Fletcher's Case*, [1892] 1 Q. B. 122.

was first introduced into the common law courts by the Common Law Procedure Act, 1854, though it had always been (as it still is) the usual practice in the Court of Chancery (now the Chancery Division) and in Admiralty. Under the Judicature Acts, this is one of the recognized modes of trial in all Divisions of the High Court, though either party may, in a proper case, obtain an order to have the facts tried by judge with a jury (*l*).

(3.) *Trial before an Official or Special Referee.*—It was provided, by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sections 3, 6, that if, at any time after the issuing of the writ of summons in an action, it was made to appear to the court or a judge, that there was no preliminary question as to the defendant's liability, but that the matter in dispute consisted wholly or in part of matters of *mere account*, which could not conveniently be tried in the ordinary way, an order might be made, that such matter should be compulsorily referred to some arbitrator selected by the parties, or else to a Master or other officer of the Court (*m*). And by the Judicature Act, 1873 (36 & 37 Vict. c. 66), section 56, it was enacted, that, subject to the right of the parties to have disputed facts submitted to the verdict of a jury (*n*), any question arising in any cause or matter, other than a criminal proceeding by the Crown, might be referred for *inquiry* and *report* to an *official* or *special* referee (*o*), whose report (if

(*l*) Ord. XXXVI. rr. 3, 4, 5, 6; *Sugg* v. *Silber* (1876), 1 Q. B. D. 362; *Ruston* v. *Tobin* (1879), 10 Ch. D. 558; *Hunt* v. *Chambers* (1882), 20 Ch. D. 365.

(*m*) *Browne* v. *Emerson* (1856), 17 C. B. 361; *Chapman* v. *Van Toll* (1857), 8 El. & Bl. 396; *Clow* v. *Harper* (1878), 3 Ex. D. 198.

(*n*) *Sugg* v. *Silber* (1876), 1 Q. B. D. 362.

(*o*) There are now three official referees who are permanent officers attached to the Supreme Court; and they perform the duties entrusted to them in such places, whether in London or in the country, as may be directed by order of court (Judicature Act, 1873, s. 83; Ord. XXXVI. rr. 45—55).

adopted) might be enforced as a judgment (*p*); and (by sects. 57—59), that, with the consent of the parties, and, in certain cases, without such consent, any question or issue of fact or question of account might be ordered to be *tried* before an official or special referee, and in that case, his report should be equivalent to the verdict of a jury (*q*). These references are now, however, regulated by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), which has modified section 56, and repealed sections 57 to 59, of the Judicature Act, 1873, besides repealing the Common Law Procedure Act, 1854, sections 3—17, and certain other Acts relating to arbitration. And now, under the Judicature Act, 1873, and the Arbitration Act, 1889, the law may be stated as follows. Subject to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter, other than a criminal proceeding by the Crown, to any official or special referee, for *inquiry and report*; and the report may be adopted, wholly or partially, by the court or a judge, and, if adopted, it may be enforced as a judgment or order to the same effect. And if all the parties interested (who are not under disability) consent, or if the cause or matter requires any prolonged examination of documents, or any scientific or local investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury, or conducted by the court through its other ordinary officers, or if the question in dispute consists, wholly or in part, of matters of account, the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before any special referee to be agreed on by the parties, or else before an official referee or officer of the court, in which latter case, the official or special referee is to be

(*p*) *Dunkirk Colliery* v. *Lever* (1878), 9 Ch. D. 20; Ord. XXXVI. rr. 45—55.

(*q*) *Rowcliffe* v. *Leigh* (1876), 3 Ch. D. 292; *Leigh* v. *Brooks* (1877), 5 Ch. D. 592.

deemed an officer of the court. In either case, that is to say, whether the reference is for inquiry and report, or for trial, then, subject to the terms of the order of reference, the referee holds the inquiry or trial at any place which he deems expedient; and he may have an inspection or a view; and he proceeds with the inquiry or trial *de die in diem*, in a similar manner as in actions tried by a jury before a judge of the High Court (*r*). Before the conclusion of any trial before him, or by his report, the referee may submit any question arising therein, or may state any facts specially, for the decision of the court; and the court has power to require any explanation or reasons from the referee, and to remit the matter referred, or any part thereof, for re-trial or further consideration, to the same or any other referee, or the court may itself decide the question, and that either on the evidence already taken before the referee, or otherwise (*s*). And generally, the court or a judge may exercise, as regards these references, all the powers which are, by the Arbitration Act, 1889, conferred on the court or a judge in relation to *voluntary* arbitrations out of court.

IV. *The Judgment.*—The issues in the action having been decided in one or other of the several modes of trial above described, the next step is the *judgment;* and inasmuch as no judgment can be entered, after verdict, without an order of the judge (*t*), some application for judgment must be made. If the application is made (as it usually is made) at the trial, the judge may then and there order judgment to be entered, in which case, the judgment will afterwards be entered by the proper officer of the court, on the production of the *associate's certificate* to that effect, such certificate now forming the substitute for what was formerly known as the *postea;* but, after verdict

(*r*) Ord. XXXVI. r. 48.

(*s*) *Dunkirk Colliery* v. *Lever* (1878), 9 Ch. D. 20.

(*t*) Ord XL. r. 1.

given, the judge, in lieu of ordering judgment to be at once entered, may adjourn the action *for further consideration.*

The practice of adjourning an action for "further "consideration" had been long in use in the Court of Chancery, but was not introduced into the King's Bench Division of the High Court, until the Appellate Jurisdiction Act, 1876, section 17, enacted, that the proceedings in an action *subsequent to the trial* should (where practicable) take place before the judge before whom the trial had taken place. Since that Act, the further consideration may be reserved, in a proper case, in the King's Bench Division.

Where, at or after any trial with a jury, the judge has directed judgment to be entered, either party may apply to set aside such judgment, and to enter any other judgment, on the ground, that the judgment directed to be entered is wrong, by reason that the finding of the jury upon the facts has not been properly entered; or on the ground that, upon the finding as entered, the judgment so directed is wrong (*u*). In either case, the application is to be made to the Court of Appeal (*x*); and all applications for a new trial are also now made to the Court of Appeal (*y*). And upon every motion that the judgment be set aside and another entered, the party who moves may, in support of his motion, urge any ground which goes to show, that he is entitled to the judgment he claims, by reason of the opposite party having either no cause of action or (as the case may be) no sufficient defence; and the court may direct judgment to be entered without regard to the findings of the jury (*z*).

(*u*) Ord. XL. rr. 3, 4.

(*x*) *Ibid.* r. 5.

(*y*) Judicature Act, 1890; Ord. XXXIX. r. 1.

(*z*) Formerly, such ground was urged in what was called a *motion in arrest of judgment*, or for *judgment non obstante veredicto*,—the first being made by an unsuccessful defendant, the latter by an unsuccessful plaintiff. But both motions are now out of use.

New Trial.—Where either party is dissatisfied with the result of the trial, and contends, either (1) that the jury have come to a wrong conclusion on the facts, or were not properly directed by the judge: or (2) that the judge wrongly directed a verdict (*a*),—in either of such cases, the party dissatisfied may apply for a *new trial*. The ground of the application for a new trial may also be some irregularity in the proceedings connected with the trial; such as want of notice of trial, or any flagrant misbehaviour of the successful party towards the jury, or gross misbehaviour of the jury themselves. Or the ground of the application may be, that the verdict is unsupported by, or is contrary to, the evidence; or that the damages are exorbitant or insufficient; or that the judge has misdirected the jury. In every case, the motion is made on notice, and the notice must specify the ground or grounds upon which the application is rested (*b*); and if, on the hearing of the motion, a new trial be ordered, then a trial of the same issue, by a new jury duly summoned and impanelled, is instituted *de novo* (*c*).

[The power of the court to set aside the verdict and grant a new trial, on account of misbehaviour in the jurors, is of a date extremely antient; and in the reign of Charles the Second, new trials came to be granted upon *affidavits*, the former strictness of the courts of law, in respect of new trials, having been then considerably relaxed (*d*).] But the courts do not, now, lend an easy ear to this sort of application, and require to be satisfied, that the merits have not been fairly discussed (*e*); so that a new trial will not be granted, where the matter is too

(*a*) *Yetts* v. *Foster* (1878), 3 C. P. D. 437; *Etty* v. *Wilson* (1878), 3 Ex. D. 359; *Solomon* v. *Bitton* (1881), 8 Q. B. D. 176; *Phillips* v. *L. & S. W. Rail. Co.* (1879), 5 Q. B. D. 78.

(*b*) Ord. XXXIX. r. 3.

(*c*) If the new trial was ordered in consequence of a mis-trial apparent on the record, the award used to be called a *venire de novo* (*Wood* v. *Bell* (1856), 6 El. & Bl. 355, 363).

(*d*) *R.* v. *Lord Fitz-Water* (1674), 2 Lev. 140, and see 1 Sid. 235.

(*e*) Ord. XXXIX. r. 6.

inconsiderable, nor upon nice objections, which do not go to the real merits, nor where the scales of evidence hang nearly equal, and the jury might reasonably have found as they have found (*f*).

Immediately after the time when the judgment has been duly entered, every person to whom, under it, any money or costs shall be payable, may forthwith enforce the same by execution as presently to be mentioned, unless, indeed the execution has been stayed for a time by order of the court.

Judgments are either *interlocutory* or *final*, an *interlocutory* judgment being one which does not finally determine or complete the action. And in the King's Bench Division interlocutory judgments are mostly those whereby the *right* of the plaintiff is established without a trial, but the *quantum* of the damages is not ascertained, which happens, *e.g.*, where the defendant, in any action brought for the detention of goods or for pecuniary damages, suffers judgment to go against him by default, by not entering an appearance, or delivering a defence, within the time limited for that purpose. In such a case, the plaintiff is entitled to an interlocutory judgment; but because the court does not know the value of the goods, or what damages the plaintiff has sustained, there must be either a writ of inquiry or some other proceeding to ascertain the value, or the *quantum* of the damages (*g*). And if the damages are to be assessed under a writ of inquiry, the writ is addressed to the sheriff, who (through his under-sheriff) ascertains, by the verdict of a jury, what damages the plaintiff has really sustained; and when the verdict is given, the sheriff returns the inquisition into court, whereupon the plaintiff enters a final judgment, and it is adjudged, that he do recover the sum so assessed and

(*f*) *Metropolitan Rail. Co.* v. *Wright* (1886), 11 App. Ca. 152; *Phillips* v. *Martin* (1890), 15 App. Ca. 193.

(*g*) Ord. XIII. r. 5.

his costs. But in many cases, though the action "*sounds* in damages," yet the amount recoverable by the plaintiff is substantially a matter of mere calculation ; and in such cases, the course is, not to issue any writ of inquiry, but to apply for an order that the amount which the plaintiff is entitled to recover shall be ascertained by one of the masters (*h*).

At common law, all judgments had relation to the first day of the term in which they were signed, though in point of fact not signed till afterwards (*i*), the term having been considered, for this and some other purposes, as consisting but of one day. But, by the present practice, all judgments (whether interlocutory or final) are entered as of the day of the month and year when they are actually pronounced, or (as the case may be) when the requisite authority or papers are left with the proper officer, to enable him to enter the judgment (*k*). And judgments have now no relation to any other day, although it is competent for the court to order a judgment to be entered *nunc pro tunc* (*l*). By the Judgments Act, 1838, section 17, every judgment debt carries interest, leviable along with the principal (*m*), at the rate of 4*l*. per cent. per annum, from the time of entering up the judgment until the same shall be satisfied.

And before we proceed to consider the modes of *execution* upon a judgment,—which is the next principal matter to be considered,—we will give a brief explanation regarding the old *Terms* and the modern *Sittings ;* and we will then add a short exposition regarding the *Costs* in an action.

(*h*) Ord. XIII. r. 5 ; Ord. XXVII. r. 4.

(*i*) *Jeffreson* v. *Morton* (1669), 2 Saund. 551.

(*k*) Ord. XLI. rr. 1, 4.

(*l*) *Miles* v. *Williams* (1846), 9 Q. B. 47 ; *Fishmongers' Co.* v. *Robertson* (1847), 3 C. B. 970 ; *Freeman* v. *Tranah* (1852), 12 C. B. 406 ; *Heathcote* v. *Wing* (1855), 11 Exch. 355 ; *Moor* v. *Roberts* (1858), 3 C. B. (N.S.) 844 ; and Ord. LII. r. 15.

(*m*) Ord. XLII. r. 16 ; *Newton* v. *Grand Junction Rail. Co.* (1846), 16 M. & W. 139.

And, First, *as regards Terms.*—Immediately prior to the date of the Law Terms Act, 1830, Easter and Trinity Terms depended on the *moveable* feasts of Easter and Trinity; but, by the provisions of the Act, Hilary Term was fixed to begin on the 11th and end on the 31st January; and Easter Term, to begin on the 15th April, and end on the 8th May; and Trinity Term, to begin on the 22nd May, and end on the 12th June; and Michaelmas Term, to begin on the 2nd November, and end on the 25th November (*n*). And, in case the day of the month on which any Term was to *end* fell on a Sunday, the Monday next after was the last day of Term (*o*).

There were certain proceedings which used to be conducted exclusively in Term,—*e.g.*, the sittings in *banc* for the determination of matters of law. But the courts of *assize* and the *nisi prius* sittings were for the most part held in the vacations, that is, during the intervals between the Terms; and all proceedings *out of court*, that is to say, such as did not require the actual presence of the judges themselves, but could be transacted between the parties and their solicitors, were in modern times transacted during any part of the year, with the exception of a period of recess, known as the "long vacation" (*p*). But the inconvenience to suitors from the above restrictions being severely felt, the division of the legal year

(*n*) *Wright* v. *Lewis* (1840), 9 Dowl. 183; *Downes* v. *Bostock*, *ib.* 241.

(*o*) 1 Will. 4, c. 3, s. 3; *Doe* v. *Roe* (1831), 1 Dowl. 63.

(*p*) The practice was antiently very different; for, antiently, all writs must have been made returnable in term; every pleading and every entry of judgment, even when in fact delivered or entered in vacation, must always have been intituled of some antecedent term; the plaintiff, though at liberty to *declare* in vacation, could not compel the defendant to plead until the subsequent term; and a party obtaining a verdict in vacation, on the trial of any issue, or on any inquisition of damages, had also to wait, in every case, until the term next following, before he could sign final judgment, or take out execution.

into Terms was eventually abolished, so far as relates to the administration of justice, by the Judicature Acts, which provided, that there should no longer be Terms applicable to any sitting or business of the High Court of Justice, or the Court of Appeal, it being also provided, however, that where, under the then existing law, the terms into which the legal year was divided were used as a measure for determining the time at or within which any act was required to be done, the same might continue to be referred to, for the same or the like purpose (*q*). There are now four *sittings* of the Supreme Court in every year (*r*), viz.: (1) The Michaelmas Sittings, commencing the 24th October and ending the 21st December; (2) The Hilary Sittings, commencing the 11th January and ending the Wednesday before Easter; (3) The Easter Sittings, commencing on the Tuesday after Easter week and ending on the Friday before Whit Sunday; and (4) The Trinity Sittings, commencing on the Tuesday after Whitsun week and ending the 12th August (*s*). And there are the following four vacations in every year (*t*), viz.: (1) The Long Vacation, commencing the 13th August and ending the 23rd October; (2) The Christmas Vacation, commencing the 24th December and ending the 6th January; (3) The Easter Vacation, commencing on Good Friday and ending on Easter Tuesday; and (4) the Whitsun Vacation, commencing on the Saturday before Whit Sunday and ending on the Tuesday after Whit Sunday. During these vacations, two of the judges (called "Vacation Judges") sit one at a time for the hearing of matters of an urgent character (*u*); but, generally speaking, no other proceedings can be taken in vacation. And, subject to the above arrangements, the sittings of the court are *continuous* (*x*).

(*q*) Act of 1873, s. 26; *College of Christ* v. *Martin* (1877), 3 Q. B. D. 16.
(*r*) Ord. LXIII.
(*s*) *Ibid.* r. 1.
(*t*) *Ibid.* r. 4.
(*u*) *Ibid.* r. 11.
(*x*) 36 & 37 Vict. c. 66, s. 30.

Secondly, *as regards Costs.*—The common law (it is said) did not allow costs; and certainly, the general opinion is, that costs depend upon statute only. The maxim of the civil law, *victus victori in expensis condemnandus est* (*y*) is now, however, generally applied.

The first statute which directed that costs should be given to a successful plaintiff in an action at law, was the Statute of Gloucester (6 Edw. 1. c. 1) (*z*); prior to which Act, costs were included in, and were recoverable as part of, the damages, in those actions in which damages were given. But because those damages were frequently inadequate to the *plaintiff's* expenses, therefore the Statute of Gloucester ordered costs (*eo nomine*) to be also added. But as the general rule, no costs were allowed to the *defendant* in an action at law, in any shape, till the 23 Hen. VIII. (1532) c. 15, 8 Eliz. (1566) c. 2, 4 Jac. 1. (1606) c. 3, 8 & 9 Will. III. (1696) c. 11, and 4 & 5 Ann. (1705) c. 3; and these gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had succeeded. But even after these enactments, there still remained several points in which the law of costs was defective, as regards both the plaintiff and the defendant; and various provisions were from time to time passed, with the object of amending these defects (*a*).

Costs are now governed principally by Order LXV., which practically, in actions in the King's Bench Division,

(*y*) Cod. 3, 1, 13.

(*z*) 3 Bl. Com. 399; 42 & 43 Vict. c. 59; *Bentley* v. *Dawes* (1854), 10 Exch. 347.

(*a*) There were many cases of vexatious proceedings, in which the legislature at one time provided, that the party in fault should pay *double* or (sometimes) *treble* costs; but, by the Limitation of Actions and Costs Act, 1842, all such provisions were repealed, and a full and reasonable indemnity only, in the shape of *taxed costs*, was to be paid. By the Public Authorities Protection Act, 1893, a plaintiff who unsuccessfully sues a public authority will have to pay solicitor and client costs, and not merely party and party costs, as in ordinary cases.

leaves the costs in the discretion of the judge (*b*), except that where the action is tried with a jury the costs abide the event, unless the judge *for good cause* otherwise orders (*b*). By the Judicature Act, 1890 (*c*), s. 5, subject to any special provision in any statute or rule, the costs of and incidental to all proceedings in the Supreme Court are in the discretion of the court or judge.

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), section 116, in order to prevent the practice of suing in the High Court in matters of small amount, it is provided, that if a plaintiff resorts thereto and recovers a sum less than 20*l.* in contract, or less than 10*l.* in tort, he shall have no costs of suit, unless the court or a judge shall certify that there was sufficient reason for his taking that course (*d*) ; and by the joint effect of the above section and Order LXV. rule 12, a plaintiff who recovers in the High Court a sum not exceeding 50*l.* in an action founded on contract, gets only county court costs, unless the judge otherwise orders. This is, however, subject to the proviso that costs may be allowed by special order ; and that if judgment is obtained under Order XIV. in an action of contract for a sum of 20*l.* or upwards, within twenty-one days after service of the writ, that judgment shall carry High Court costs. In a penal action, no costs were ever allowed to a plaintiff suing as a common informer, unless where they were expressly given by the statute on which he sued ; for, as the action itself created the right, he had no claim to damages, and the general rule of law used to be, that, where there were no damages, there were no costs (*e*). But costs in such a case would now go with the judgment, unless the judge interposed his discretion (*f*). And as regards *pauper suitors*, that is, such as will swear

(*b*) Ord. LXV. r. 1.

(*c*) 53 & 54 Vict. c. 44.

(*d*) *Marshall* v. *Martin* (1870), L. R. 5 Q. B. 239.

(*e*) *College of Physicians* v. *Harrison* (1829), 9 B. & C. 524.

(*f*) Civil Procedure Acts Repeal Act, 1879.

themselves not worth 25*l.* in the world, except their wearing apparel and the matter in question in the cause (*g*), they were, by the 11 Hen. VII. (1495), c. 12, and 23 Hen. VIII. (1532), c. 15, exempted from the payment of court fees (*h*); and under the present practice, they are entitled to have counsel and solicitor assigned to them without fee, and are excused from paying costs when unsuccessful (*i*). But a person thus suing or defending may recover costs out of pocket (*k*); for the counsel and clerks of court are bound to give their labour to *him* only, and not to his antagonist.

It is, however, to be observed, that, in the Court of Chancery, the costs to be given to either party were never held to be a matter of *right*, but were merely discretionary, according to the circumstances of the case; and they still are so (*l*). No order as to costs left to the discretion of the court is, except by leave, subject to appeal (*m*).

V. *The Execution.*—If the judgment entered in the High Court be not suspended, varied, or reversed by the Court of Appeal, as presently to be mentioned, the next step in the action is the *execution* of that judgment, or

(*g*) *Pratt* v. *Delarue* (1842), 10 M. & W. 509; Ord. XVI. rr. 22—30.

(*h*) These Acts *in favorem paupertatis* had no application to the case of a *defendant*.

(*i*) Blackstone says (vol. iii. p. 400), that it was formerly usual to give pauper plaintiffs, if non-suited, their election, *either to be whipped or to pay their costs*. By the Appeal (Formâ Pauperis) Act, 1893, the appeals of paupers to the House of Lords have been placed under stringent regulations; and by the Vexatious Actions Act, 1896, certain vexatious litigants may be deprived altogether of the right to use (*i.e.*, to misuse) the courts.

(*k*) Ord. XVI. r. 31; *Carson* v. *Pickersgill* (1885), 14 Q. B. D. 859.

(*l*) Judicature Act, 1890, s. 5; Ord. LXV. r. 1; but this is not to deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund "*to which he would be* "*entitled according to the rules* "*hitherto acted upon in courts of* "*equity*" (*Smith* v. *Dale* (1881), 18 Ch. D. 516; *Ex parte Russell*, *In re Butterworth* (1882), 19 Ch. D. 588; *Hill* v. *Spurgeon* (1885), 29 Ch. D. 348).

(*m*) Act of 1873, s. 49; *Re Bradford* (1883), 15 Q. B. D. 635.

putting the sentence of the law in force. This is done by issuing a "writ of execution" or by attachment of debts or sequestration, or in the other modes hereinafter mentioned (*n*). There are different writs of execution; there are writs against the judgment debtor's *goods* (*o*), and also writs against his *lands* (*p*). A writ of execution is a document issued out of the central office of the High Court, and is directed to the sheriff, and by it he is commanded to execute the judgment in the manner specified in the writ itself.

There are specific executions for specific judgments; and not all executions issue on all judgments. In an ordinary legal action, the judgment is for the recovery of *money* only; and the judgment is enforced by a writ of *fieri facias*, or of *elegit*, or in the manner hereinafter pointed out. In the case of *detinue*, however, in which the judgment is for the recovery of specific goods which are detained, or the value thereof, with damages and costs, there was a special process of execution in use, called a

(*n*) See further as to these, *post*, pp. 631—633.

(*o*) Until a recent period, execution on a judgment might also, in cases above 20*l*., have issued against the *person* of the debtor; who might have been arrested and imprisoned, under the writ of *capias ad satisfaciendum*. But, by the Debtors Act, 1869, no person may now be arrested or imprisoned for making default in payment of a sum of money, except in the cases specified in sect. 4 of the Act (*Chard* v. *Jerris* (1882), 9 Q. B. D. 178; *Brooke* v. *Edwards* (1882), 21 Ch. D. 230; Debtors Act, 1878); and except that persons who (having the means) refuse or neglect to pay debts, due from them in pursuance of any order or judgment, may be committed *for a term of six weeks or until payment* (*Hewitson* v. *Sherwin* (1870), L. R. 10 Eq. 53). The committal order may be made either in the superior court or, where the debt does not exceed 50*l*., by the county court (*Dillon* v. *Cunningham* (1872), L. R. 8 Exch. 23). Persons so committed (or imprisoned) are subject to the differential treatment provided for by the Prison Act, 1898.

(*p*) Judgments Act, 1838, s. 11. A judgment against a mortgagee (which would formerly have bound the land mortgaged, even though the mortgage was paid off and the land actually conveyed to a purchaser or another mortgagee) has no longer that effect (Judgments Act, 1855, s. 11).

distringas, to compel the defendant to deliver the goods, by repeated distresses levied upon his chattels; and this writ was recognized by the Common Law Procedure Act, 1854 (*q*), and, under the Judicature Acts, it is preserved, under the name of a "writ of delivery" (*r*). Again, in an action for the *recovery of land*, a judgment for the plaintiff therein, requiring the defendant to deliver the possession thereof to the plaintiff, may be enforced by a "writ of *possession*"; and by such writ of possession, the sheriff is commanded to enter on the land which is the subject of the action, and to cause the plaintiff to have possession thereof with its appurtenances (*s*).

As regards writs of execution generally, it should be mentioned, that the writ must be executed within a year from the date of its issue, unless it should, in the meantime, have been properly renewed; but the writ may issue (as between the original parties) at any time within *six years* from the recovery of the judgment, though, after that time, the party alleging himself to be entitled to execution must apply for leave to issue it (*t*).

The leave of the court, before issuing execution on a judgment, may also be required by reason of a *change of parties* to the action. This change may occur, first, by *death*, wherein the rule formerly was, that if either of the parties died before final judgment the action would abate, and, if the death took place after final judgment, a *scire facias* was necessary in order to enforce the execution. But under the present practice (*u*), and ever since the Common Law Procedure Act, 1852, the death of either plaintiff or defendant does not cause the action to abate; but the proceedings (supposing the right of action to sur-

(*q*) 17 & 18 Vict. c. 125, s. 78; *Chilton* v. *Carrington* (1855), 15 C. B. 730.

(*r*) Ord. XLVIII. (The distress now includes the defendant's lands.)

(*s*) Ord. XLVII.

(*t*) Ord. XLII. r. 23.

(*u*) Ord. XVII. (before final judgment); Ord. XLII. r. 23 (after final judgment).

vive) is ordered to be continued by or against the proper parties. Again, if a female plaintiff or defendant *married*, the action used to be thereby abated, and, where judgment had been obtained, the plaintiff was driven to *scire facias* to enforce the judgment (*x*) ; but, after the Common Law Procedure Act, 1852, an action did not abate by marriage, though a *suggestion* on the record was required of the marriage. And the like *suggestion* was necessary, in case a plaintiff became a bankrupt, after he had obtained judgment, but before he had issued execution (*y*). Under the Judicature Acts, the law on these matters has not been altered, but the process requisite to carry on the proceedings (at whatever stage of the action the change of parties occurs) has been made more simple, it being provided, that, in the case of the death, bankruptcy, or devolution of the estate by operation of law, of any party to an action during the pendency thereof, such order may be made, as to new parties, or as to a change in the capacity in which the original parties sued or were sued, as shall be deemed necessary by the court for a complete settlement of all the questions involved in the action ; and this merely upon an *ex parte* application, the order being served on any party affected thereby, who, if he objects thereto, must, within twelve days of the service, apply that the order may be discharged or varied (*z*).

Since the Married Women's Property Act, 1882, the marriage of a plaintiff has had no practical effect on an action or execution.

As regards the operation of judgments on goods, it should be observed that at common law the debtor's goods were bound as from the date of the writ of execution. The Statute of Frauds (29 Car. 2, c. 3), section 16, provided

(*x*) *Walker* v. *Golling* (1843), 11 M. & W. 78 ; *Underhill* v. *Devereux* (1669), 2 Saund. by Wms. 72 *k*.

(*y*) *Winter* v. *Kretchman* (1787), 2 T. R. 45.

(*z*) Ord. XVII. rr. 1—3.

that the goods should only be bound as from the date of the delivery of the writ to the sheriff. This was modified by the Mercantile Law Amendment Act, 1856, which provided that, as against purchasers without notice of the writ, the goods should be bound only from the time of the actual seizure thereof under the execution. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), while it repeals the last-mentioned Act, contains a similar enactment, saying more specifically, that the goods shall be bound *as from the time when the writ is delivered to the sheriff*, except as against a purchaser in good faith and for value, who has no notice that the writ has been delivered to, and remains unexecuted with, the sheriff (s. 26) (*a*).

As regards the operation of a judgment on *lands*, the Law of Property Amendment Act, 1860, section 1, provided, that, as against a purchaser for valuable consideration, or a mortgagee, no judgment should affect any *land*, unless execution thereon should have been issued and registered; and the Judgments Act, 1864, section 1, provided, that no judgment should affect any land until the land should have been *actually delivered in execution* (*b*). These sections were repealed by the Lands Charges Act, 1900, which provides (s. 2) that no judgment shall operate as a charge on land until a writ or order for the purpose of enforcing it is registered. The writ must be registered in the name of the debtor against whom it is obtained, in the office of Land Registry (*c*).

With a view to ascertaining what property the debtor has, and so to aid the plaintiff in obtaining satisfaction of his debt, an order may be obtained compelling the debtor

(*a*) *Hasluck* v. *Clark*, [1899] 1 Q. B. 699, and cases there cited.

(*b*) *Kemp* v. *Waddingham* (1866), L. R. 1 Q. B. 355; *Gardner* v. *London, Chatham and Dover Rail. Co.* (1867), L. R. 2 Ch. App. 385; *Hatton* v. *Haywood* (1874), L. R. 9 Ch. App. 229; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275.

(*c*) Land Charges, etc. Act, 1888, ss. 5, 6; Land Charges Act, 1900.

to attend and be examined, and to make discovery as to his property (*d*).

The following are the writs of execution by which a judgment for the recovery of money is enforced.

1. *A Fieri Facias.*—This is a writ of execution against the goods and chattels of the judgment debtor, and it is so termed from the words of the writ, whereby the sheriff is commanded, that he cause to be made of the goods and chattels (*quod fieri facias de bonis*) of the party, the amount of the judgment debt and costs. From this writ neither peers nor any other privileged persons are exempt; and it lies against executors or administrators, with regard to the goods of their deceased testators or intestates (*e*). In executing this writ, the sheriff may not break open any outer door, but must enter peaceably (*f*), and may then break open any inner door in order to take the goods (*g*); and he cannot execute the writ on a Sunday (*h*), or within the precincts of a royal residence (*i*). The sheriff may sell the goods and chattels of the debtor (*k*), including even his estates for years, or his growing crops, till he has raised enough to satisfy the judgment (*l*). The exercise of this power of sale in the sheriff is subject to certain safeguards and limits. By the Landlord and Tenant Act, 1709, the landlord must be first paid his rent, due before the execution, to the extent of one year's arrears (*m*); and

(*d*) Ord. XLII. r. 32.

(*e*) *Fenwick* v. *Laycock* (1841), 2 Q. B. 108.

(*f*) 5 Rep. 92.

(*g*) Palm. 54; *Morrish* v. *Murrey* (1844), 13 M. & W. 52.

(*h*) Arch. *Practice* (14th ed.), p. 810.

(*i*) *Att.-Gen.* v. *Dakin* (1870), L. R. 4 H. L. 338; *Combe* v. *De la Bere* (1882), 22 Ch. D. 316.

(*k*) When the execution is for a sum exceeding 20*l.*, the sale must be by public auction, unless an order is obtained specially authorising a sale by private contract (Bankruptcy Act, 1883, s. 145; Bankruptcy Act, 1890, s. 12).

(*l*) 3 Bl. Com. 417.

(*m*) *Rissley* v. *Ryle* (1843), 11 M. & W. 17; *Wollaston* v. *Stafford* (1854), 15 C. B. 278. It is, however, provided by the Execution Act, 1844, s. 67, that no landlord of any tenement let at a *weekly* rent shall have any

by the Sale of Farming Stock Act, 1816, no straw, hay, manure, or the like, which, by the covenants of the lease, is prohibited as between the landlord and the tenant from being carried off the premises, may be sold, *save to some person who will agree* (in writing) *to use and expend the same upon the premises and according to the obligation of the tenant* (*n*). And by the Landlord and Tenant Act, 1851, section 2, if growing crops are seized and sold on a *fi. fa.* or other writ of execution by the sheriff, they will still, so long as they remain on the lands, and where there is no other sufficient distress, be liable to be distrained for rent becoming due from the tenant after such seizure and sale, although goods once sold cannot be again taken in *execution* for the same debt (*o*).

No personal chattel which was not in its nature properly capable both of manual seizure and of sale could be taken under this writ; but now, by the Judgments Act, 1838, section 12, the sheriff may take any *money, bank notes, bills of exchange*, or other *securities for money*, belonging to the judgment debtor (*p*), suing upon such bills or securities in his own name, and paying over the money to be recovered thereon to the creditor.

In case the sheriff is unable to sell, at a reasonable price, the goods taken in execution, he may make his *return* (*q*) upon the writ, that they remain in his hands for want of buyers; upon which the judgment creditors

claim or lien upon any goods taken in execution under the process of any court of law, for more than *four weeks'* arrears of rent; and, in like manner, in the case of a tenement let for any other term *less than a year*, the landlord shall not have any such claim or lien for more than the arrears of rent accruing during *four* such terms or times of payment (*Wharton* v. *Naylor* (1848), 12 Q. B. 673).

(*n*) *Wilmot* v. *Rose* (1854), 3 El. & Bl. 563.

(*o*) *Haddow* v. *Morton*, [1894] 1 Q. B. 95, 565.

(*p*) *Collingridge* v. *Paxton* (1851), 11 C. B. 683.

(*q*) *I.e.*, the account he gives to the court, if required to do so, as to what he has done under the writ.

may proceed to take out a writ of *venditioni exponas*, or writ *assistant*, under which the sheriff is bound to sell the goods at all hazards, *i.e.*, for the best price that can be obtained, however inadequate (*r*).

2. *A Levari Facias.*—This was an execution which affected a man's goods and the *profits* of his lands, the writ commanding the sheriff to levy the judgment debt on the lands and goods of the party against whom it was issued; and on this writ the sheriff seized all the debtor's goods, and, till satisfaction was made, received the rents and profits of his lands (*s*). No writ of *levari facias* may now issue in any civil proceeding (*t*); but analogous to the writ of *levari facias*, there is a writ of execution, proper only against the clergy, and which is given, when the sheriff, upon a common writ of *fieri facias*, returns *nulla bona*, *i.e.*, that there are no goods of the debtor that he can take in execution, and that the party is a beneficed clerk, not having any lay fee (*u*). In which latter case, inasmuch as *bona ecclesiastica* are not to be touched by lay hands, a writ, in the nature of a *levari facias* (*x*), but which is termed a *sequestrari facias de bonis ecclesiasticis*, goes to the bishop of the diocese, commanding him to enter into the benefice, and to take and sequester the same into his possession, until he shall have levied the amount of the judgment debt out of the rents, tithes, and profits thereof (*y*); and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directing the churchwardens to collect such profits, and, after providing thereout for the offices of the church, to pay over the surplus to the judgment creditor, until the full sum due is recovered (*z*).

(*r*) *Keightley* v. *Birch* (1814), 3 Camp. 521; Ord. XLIII. r. 2.

(*s*) Finch, L. 471.

(*t*) Bankruptcy Act, 1883, s. 146.

(*u*) 3 Bl. Com. 418.

(*x*) Reg. Orig. 300; Judic. 22; 2 Inst. 4.

(*y*) *Harding* v. *Hall* (1842), 10 M. & W. 42; Ord. XLIII. r. 5.

(*z*) *In re Lawrence*, [1896] P. 244; *Lawrence* v. *Adams* (1896), 75 L. T. 410.

3. *An Elegit.*—This species of execution was given by the Statute of Westminster the Second, (13 Edw. I.), c. 18 (*a*); for, before that statute, a man could only have the *profits* of lands in satisfaction of his judgment, and not the *possession* of the lands. Upon an elegit issued under the 13 Edw. I. c. 18, which elegit extended to the goods as well as to the lands, the judgment debtor's goods and chattels were not sold (as on a *fi. fa.*) but only appraised, and then, except his oxen and beasts of the plough, were offered to the judgment creditor at such appraisement, in satisfaction of his debt (*b*); and if the goods of the debtor proved not to be sufficient, then one *moiety* of the debtor's lands of freehold tenure, which he had at the time of the judgment given (whether held in his own name or by any other in trust for him) were also to be delivered to the judgment creditor, to hold till out of the rents and profits thereof the debt was levied, or till the judgment debtor's interest therein expired (*c*). Now, by the Judgments Act, 1838, section 11, the sheriff delivers the *entirety* of the lands, including those of copyhold or customary tenure, and including also those over which the debtor has any general *disposing power* (*d*); and by the Judgments Act, 1864, section 4, as amended by the Land Charges Act, 1900, every creditor to whom his debtor's land shall have been *actually delivered* in execu-

(*a*) *Sherwood* v. *Clark* (1846), 15 M. & W. 764; *Carter* v. *Hughes* (1858), 2 H. & N. 714.

(*b*) 3 Bl. Com. 418.

(*c*) 2 Inst. 395; Statute of Frauds, s. 10.

(*d*) An elegit is always *returned* by the sheriff (that is, it is filed in court after execution), so as to complete the tenant's title; and in this respect, it differs from a *fi. fa.*, although a *fi. fa.* also would be returned by the sheriff, if he was ordered to do so (Arch. *Practice* (14th ed.), 815). When it is returned upon an *elegit*, that land has been delivered to the plaintiff, he is entitled at once, (subject to the estates of any parties which commenced before the judgment,) to enter upon such land, peaceably; or, if necessary, to recover it by action, on which issues the writ of possession (*habere facias possessionem*). And only after such entry, or writ, is he *tenant by elegit*.

tion under a judgment, may obtain an order for the sale of his debtor's interest in such land (*e*). Such order used to be obtained only on petition, but is now to be obtained, in general, on summons (*f*). It is important to recollect, however, that the writ of elegit is no longer available for the seizure of *goods* in execution ; the Bankruptcy Act, 1883, having provided (s. 146) that it should not extend to goods.

4. *Sequestration.*—This writ is not often used in the King's Bench Division. Its nature and effect are treated of, *post*, p. 645.

5. *A Charging Order.*—By the Judgments Act, 1838, sections 14, 15, and the Judgments Act, 1840, section 1, on application of the judgment creditor, the property of the debtor in government stock, or in the stock of any public company in England (corporate or otherwise) may be *charged* with the payment of the amount of the judgment debt and interest, so as to give the judgment creditor the same remedies as if the charge had been voluntarily made in his favour by the judgment debtor (*g*) ; but no proceedings may be taken on the order, till after *six calendar months* from its date (*h*). The applicant for the order applies *ex parte* to a master or district registrar for an order *nisi* (*i*), upon an affidavit identifying the stock or shares, and verifying the fact of the unsatisfied judgment, and also showing the right of the judgment debtor to the stock or shares (*k*). Unless good cause against the order *nisi* is shown within the time in that behalf appointed by the order, the order is made absolute by the judge (*l*).

(*e*) *In re Bishop's Waltham Rail. Co.* (1866), L. R. 2 Ch. App. 382.

(*f*) Ord. LV. (Nov. 1893), r. 9*b*.

(*g*) Ord. XLVI. ; 5 Vict. c. 8.

(*h*) *Churchill* v. *Bank of England* (1843), 11 M. & W. 323.

(*i*) *I.e.*, an order changing the stock unless (*nisi*) sufficient cause to the contrary be shown to the judge on a day named in the order.

(*k*) Judgments Act, 1840, s. 1.

(*l*) Judgments Act, 1838, s. 15.

6. *A Garnishee Order: Attachment of Debts.*—Under a writ of *fieri facias*, the sheriff cannot seize debts due to the judgment debtor. If there be such debts, and the plaintiff desires to make them available for the satisfaction of his judgment, he can do so by a proceeding called "attachment of debt." This is done by obtaining what is called a "garnishee order." This order, like the charging order, is also an order *nisi* in the first instance (*m*), and is in due course made absolute (*n*). It charges (to the full extent of the judgment debt) all moneys belonging to the debtor in the hands of the "garnishee," and all debts owing from the garnishee to the debtor (*o*), the garnishee being any third person alleged to hold such moneys or to owe such debts. The effect of the service of the garnishee order *nisi* is to bind all such moneys and debts, as from the date of service (*p*); and if the garnishee do not appear to the order requiring him to appear and show cause against the order *nisi*, or if he do not dispute the debt due or claimed to be due from him to the judgment debtor, the order *nisi* is made absolute (*q*). But if he *bonâ fide* disputes the fact of any moneys belonging to the judgment debtor being in his hands, or any debts being due from him to the judgment debtor, or if he alleges some third person to be owner of, or to have some lien on, such moneys or debts (*r*), an issue will be directed to try the fact (*s*).

7. *Receiver.*—In cases where there are no assets of the debtor that can be taken in execution by any of the means above mentioned, but the debtor has an equitable or con-

(*m*) Ord. XLV. r. 1; *Holmes* v. *Tutton* (1855), 5 El. & Bl. 65; *Johnson* v. *Diamond* (1855), 11 Exch. 431; *Dresser* v. *Johns* (1859), 6 C. B. (N.S.) 429.

(*n*) Ord. XLV. rr. 3, 5; *Re Price* (1869), L. R. 4 C. P. 155; *Horsley* v. *Cox* (1869), L. R. 4 Ch. App. 92; *Hall* v. *Pritchett* (1877), 3 Q. B. D. 215.

(*o*) *Chatterton* v. *Watney* (1881), 17 Ch. D. 259.

(*p*) Ord. XLV. r. 2; *Sampson* v. *Seaton Railway Company* (1874), L. R. 10 Q. B. 28; *Tapp* v. *Jones* (1875), *ib.* 591.

(*q*) Ord. XLV. r. 3.

(*r*) *Ibid.* rr. 4, 5.

(*s*) *Ibid.* r. 6.

tingent interest in land or other property, an order may be obtained appointing some named person receiver to receive the debtor's interest in the property, and so to make it available for satisfaction of the judgment. This is commonly called "*equitable execution.*"

When the demand of the judgment creditor is satisfied, either by the voluntary payment of the debtor, or by this compulsory process, or otherwise, *satisfaction* may be *entered on record*, to the end that the debtor may not be liable to be hereafter harassed a second time on the same account (*t*).

VI. *Appeal.*—The judgment obtained in the High Court, may, if erroneous, be reversed or varied by the *Court of Appeal* (*u*). Before the Judicature Acts, the method of setting right a final common law judgment, where the fault appeared by the record itself, was by proceedings *in error* (*x*); and, in the case of a decision

(*t*) Crown Debts and Judgments Act, 1860, s. 2; Lis Pendens Act, 1867; Arch. *Practice* (14th ed.) 779.

(*u*) An erroneous judgment might also, formerly, have been redressed (or relieved from) on a writ of *attaint* (*vide sup.* p. 608); or on a writ of *deceit*; or on a writ of *audità querelâ*. A writ of deceit (abolished by the Real Property Limitation Act, 1833, s. 36) was an action brought in the Common Pleas to reverse a judgment obtained in a *real* action, by fraud or collusion between the parties, to the prejudice of a third person. And a writ of *audità querelâ* was a writ for a defendant against whom judgment has been given, but who was entitled to be relieved *upon some matter of discharge since the judgment*, as a general release from the plaintiff, or payment of the debt sued for. It stated that the complaint of the defendant had been heard, *audità querelâ defendentis;* and set forth the matter of complaint, and enjoined the court to call the parties before them, and cause justice to be done. By Ord. XLII. r. 27, no proceeding by *audità querelâ* may now be used; but any party may apply summarily for a stay of execution or relief against a judgment, upon the ground of facts which have arisen too late to be pleaded.

(*x*) Proceedings in error used, at one period, to begin by a *writ* sued out of the common law side of the Court of Chancery, addressed to the chief justice of the court in which the judgment was given, and commanding him to

of the court in regard to an application for a new trial, or as to a point reserved (*y*), was by way of *appeal*. But the Judicature Acts abolished proceedings in error altogether, and substituted an appeal, in all cases, where the Court of Appeal had occasion to deal with what had taken place in the High Court. And these Acts have also given the Court of Appeal much more elastic powers than were exercised in the previous Courts of Error, having provided (in effect) that the Court of Appeal shall have all the powers and duties, as to amendment and otherwise, of the court of first instance, with full discretionary power to receive further evidence (not raising an altogether new and inconsistent case) upon *questions of fact*, and generally to give such judgment as ought to have been given in the High Court (*z*). The Court of Appeal may also deal with any interlocutory order made in the action, including (if leave be given by the court or judge making the order) orders as to discretionary costs, and orders made by consent (*a*). But, except by special leave, no appeal may be made from an interlocutory order after the expiration of fourteen days, or any other appeal after the expiration of three months (*b*). And no appeal now operates as a *stay of execution*, or as a stay of proceedings under the judgment, order, or other decision appealed from, except so far as the court appealed from (or any

send a transcript of the record to the Court of Error; but, by the Common Law Procedure Act, 1852, s. 148, this writ was dispensed with in almost every case (*Arding* v. *Holmes* (1856), 26 L. J. Exch. 72). There were errors *in fact*, and errors *in law*, an instance of the first kind being, that the defendant being an infant appeared by solicitor instead of guardian; and an error in law was founded on some mistake in law apparent on the face of the record, such as might have formed the subject of a demurrer.

(*y*) Common Law Procedure Act, 1854, ss. 34, 35.

(*z*) Ord. LVIII. r. 4. This includes the power of ordering a *new trial* (Ord. LVIII. r. 5); and so, conversely, upon an application for a new trial, the Court of Appeal may treat the application as an appeal (Ord. XL. r. 10).

(*a*) Act of 1873, s. 49.

(*b*) Ord. LVIII. r. 15 (as amended November, 1893).

judge thereof), or the Court of Appeal itself, may direct (*c*). All appeals from the High Court of Justice to the Court of Appeal are by way of *rehearing* (*d*).

The appeal is brought by a notice of motion (*e*), such notice being served upon all the parties directly affected by the appeal, and on them alone; but the Court of Appeal may direct the notice of appeal to be served on any person, whether a party or not to the action, postponing or adjourning the hearing of the appeal in the meantime, upon such terms as shall be just (*f*). All appeals from final judgments or orders are determined before not less than three judges of the court sitting together; and all appeals from interlocutory orders, before two judges so sitting (*g*).

Having now stated all the proceedings in an action from the commencement thereof by writ of summons to the conclusion thereof by judgment and execution thereon, or by appeal, we may summarize the various steps or stages in the action, with the times appointed for each.

THE STEP.	THE TIME.
Defendant's appearance to writ of summons.	Within eight days after service of writ.
Statement of claim,—delivery of, if ordered.	Within time specified in the order or, if no time specified, within six weeks from date of order.

(*c*) *Ibid.* r. 16. The rules also contain provisions with regard to *cross* appeals; and with regard to the mode of bringing the evidence in the court below before the Court of Appeal (*ibid.* rr. 6, 11).

(*d*) Ord. LVIII. r. 1.

(*e*) *Ibid.* r. 2.

(*f*) *Ibid.*

(*g*) Judicature Act, 1875, s. 12. The parties may now agree to a final appeal being heard before two judges of the Court of Appeal (Judicature Act, 1899, s. 12).

THE STEP.	THE TIME.
Defence,—delivery of ;	Within time specified in the order for it, or if no time so specified, within ten days after delivery of statement of claim.
but, if to specially indorsed writ,—	Within eighteen days from service of writ, unless the plaintiff within that time serves a summons for judgment or for directions ; in which case within time limited in the order, or, if no time limited, eight days from date of order.
Reply,—delivery of, if ordered -	Within time limited by the order or, if no time so limited, within ten days after delivery of defence.
Trial, notice of, delivery of ;	With reply (if any), or within the time limited by the order for directions, or at any time after the issues are ready for trial.
but if given by defendant ;	After six weeks from pleadings closed.

THE STEP.	THE TIME.
Trial, notice of, etc.—*continued.* or, if trial under Order XVIIIA. (*i.e.*, without pleadings) ;	Within ten days after appearance.
Trial, notice of, length of- -	Ten days ; or (if short) four days ; or (if trial under Order XVIIIA.) twenty-one days.
New trial,—notice of motion for, —delivery of.	Within eight days after trial,—but (if elsewhere than in London or Middlesex) within seven days after last circuit day.
New trial,—notice of motion for,—length of.	Fourteen days.
Appeal to Court of Appeal,—notice of motion for, delivery of :	
(1) from final order or judgment.	Within three months (*h*).
(2) from any other order -	Within fourteen days (*h*).
(3) from *ex parte* refusal -	Within four days.
Appeal to Court of Appeal, notice of motion for, length of :	
(1) in case of final order or judgment.	Fourteen days (*i*).

(*h*) The three months and the fourteen days reckon respectively from the date of the judgment or order being perfected, or (in case of refusal of order) from date of refusal. (See *Re Helsby*, [1894] 1 Q. B. 742.)

(*i*) Cross-appeal—eight days.

THE STEP.	THE TIME.
Appeal to Court of Appeal, etc. —*continued.*	
(2) in case of any other order.	Four days (*k*).
Appeal to Divisional Court,—notice of motion, delivery of :	
(1) if from inferior courts -	Within twenty - one days.
(2) if from chambers (*l*) -	Within eight days (in general).
Appeal to Divisional Court,—notice of motion, length of :	
(1) if from inferior courts -	Eight days.
(2) if from chambers -	Two clear days.
Execution on judgment,—issue of.	Within six years.
Execution on judgment,—renewal of.	Within one year after issue.

And as regards the various interlocutory applications in the course of an action,—*e.g.*, for interrogatories and inspection ; and for the amendment of pleadings, and the like,—there are divers times prescribed, reckoning, in general, from some other step in the action. These times may, in most cases, be extended by order.

(*k*) Cross-appeal—two days.

(*l*) Appeals from orders in chambers (when they lie) in matters of practice and procedure are to the Court of Appeal; Judicature Act, 1894, s. 1 (4).

CHAPTER XV.

OF PROCEEDINGS IN THE CHANCERY DIVISION.

We shall now proceed to consider an action in the Chancery Division,—first, where such action is commenced by writ of summons, and secondly, where it is commenced by originating summons.

And first, where the *action* is commenced by Writ of Summons. There are all the same stages or steps in the action as we have just gone through in treating of an action in the King's Bench Division ; and there is really very little variation even in the matters comprised in, or which constitute or are incidental to, the successive steps or stages. But there are some variations, and we must now consider these.

I. *The Process.*—The plaintiff must procure the cause to be assigned to one of the judges of the Chancery Division (*a*). As regards the indorsements of claim required on every writ of summons, these vary with the nature of the equitable relief that may be sought, and include claims as a creditor, or as a legatee, to have the estate of one who is deceased administered ; to have the accounts of certain partnership or mortgage transactions taken ; that certain trusts may be carried into execution ; that a certain deed may be set aside or rectified ; for the specific performance of agreements ; and the like (*b*). And it is specifically provided, that in all cases of ordinary

(*a*) Ord. V. rr. 5, 9; Ord. XLIX. The assignment is now by ballot in the writ department before issue of writ, and the plaintiff has now no choice of judge. Ord. V. r. 9 (see *Yearly Practice*, 1903, p. 159).

(*b*) See examples given in R. S. C., App. A. part iii. sect. i.; also App. L.

account, as, for instance, in the case of a partnership, executorship, or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be expressly indorsed with a claim that such account be taken (*c*). And note, that in an action which is properly assigned to the Chancery Division, there is no judgment for default of *appearance* to the writ (*d*) ; but the plaintiff files the usual affidavit of service, and his statement of claim. And with regard to the parties, one of several persons interested with others in an estate (as, for example, one of several residuary legatees or devisees, or one of several *cestuis que trustent*) may obtain an administration decree without serving the rest ; and in all cases of suits for the protection of property, one person may, in general, sue on behalf of himself and of all others having the same interest, although the court may require any other persons to be made parties, as it may deem proper (*e*). Also, an unknown heir-at-law, customary heir, or unascertained next of kin, or an unborn co-tenant may, in any action involving a question of construction, be represented by a nominee defendant (*f*) ; and trustees, executors, and administrators represent their respective beneficiaries, whether suing or being sued (*g*), although the court may at any time direct the beneficiaries to be joined as parties. An heir-at-law need not be made a party, unless the will is to be established against him (*h*) ; and one or more persons out of a numerous class having the same or the like interest may sue or be sued, or may be *ordered* to defend, on behalf of the entire class (*i*).

II. *With regard to the Pleadings.*—No special regulations for the Chancery Division exist with regard to these ;

(*c*) Ord. III. r. 8; Ord. XXXIII. rr. 2—9.
(*d*) Ord. XIII. r. 12; Ord. XXI. r. 8.
(*e*) Ord. XVI. r. 39.
(*f*) *Ibid.* r. 32.
(*g*) *Ibid.* r. 8.
(*h*) *Ibid.* r. 45.
(*i*) *Ibid.* r. 9.

but it is obvious, that the statement of claim (and, indeed, the pleadings generally) must often, from the nature of the relief sought, be much more complicated and lengthy than those in an action in the King's Bench Division. For example, in an action of foreclosure by A. against B., the statement of claim commences by stating shortly the mortgage under which A. claims, the amount which it was given to secure, and the rate of interest ; the title of A. is then shown, in case the mortgage was not made directly to him ; and the title of B. (as known to A.) is stated, in case the mortgage was not made by B. ; and, after alleging the sum lent to be still due, with arrears of interest, the statement of claim proceeds to ask, that an account may be taken of what is due on such security to the plaintiff, and that the defendant may be *decreed* to pay the same, on a certain day to be appointed by the court, to the plaintiff, together with his costs of action—the plaintiff on his side offering, on being so paid, to convey the premises, as the court shall direct ; and further claiming, that, in default, the defendant may be *foreclosed* of his equity of redemption. To such a statement of claim, the defendant usually has no defence, but sometimes the defendant may, in his defence, allege (1.) That the contents of the mortgage deed are not correctly stated in the statement of claim, as, for instance, that the sum advanced was less than that stated in the claim, and that the rate of interest was also lower ; or (2.) That he has, before action brought, repaid the sum due on the mortgage, together with all arrears of interest thereon. So, in an action for *specific performance*, the statement of claim would allege, *e.g.*, that the defendant agreed to grant a lease to the plaintiff, and has refused to do so ; and the defendant might, in such a case, state in his defence, that the plaintiff, having been let into possession, has broken one of the covenants of the proposed lease ; to which the plaintiff might reply, that he never in fact broke the covenant as alleged, or that, if he did, such breach was waived by the defendant. Under

the present rules of pleading, the plaintiff is not required to anticipate, in his statement of claim, the case of the defendant (*k*). And note, that, for default in pleading, judgment may be obtained in the Chancery Division, equally as in the King's Bench Division.

III. *Trial and Evidence.*—The party giving notice of trial in an action in the Chancery Division will prefer the matter to be disposed of by the judge himself without a jury ; and, in fact, a jury in the Court of Chancery has ever been an anomaly, and almost a fiction, it having been the practice to send issues of fact to the courts at Westminster, or to the assizes, for the determination thereof, and to refer questions of *law* (as distinct from *equity*) to one of these courts for its opinion, the judges certifying their opinion into the Chancery. Now, under the Judicature Acts, the practice is as follows. With regard to issues of *law*, the Chancery Division not only can, but must, decide these issues for itself ; and, with regard to issues of *fact*, the occasions which arise under the new system for the intervention of a jury in actions assigned to the Chancery Division, are not much more frequent in number than before. And indeed all actions in the Chancery Division, being actions which are of a nature exclusively appropriate to that Division, are now to be tried by a judge without a jury (*l*), unless the judge specifically orders a trial with a jury ; and if the Chancery judge should order an action, or an issue of fact therein, to be tried before a judge with a jury, such trial is not had in the Chancery Division itself, but before the King's Bench Division sitting in Middlesex, or at the assizes. And although the order directing such trial must at one time

(*k*) *Hall* v. *Ere* (1876), 4 Ch. D. 341.

(*l*) Ord. XXXVI. r. 3 ; *Swindell* v. *Birmingham Syndicate* (1876), 3 Ch. D. 127 ; *Cardinall* v. *Cardinall* (1884), 25 Ch. D. 772 ; *Jenkins* v. *Bushby*, [1891] 1 Ch. 484.

have stated the reason for directing the action or issue to be so tried, that is not now necessary (*m*).

An important distinction is to be noticed with regard to the manner of giving evidence in an *action* commenced by writ of summons in the Chancery Division, and in matters brought forward in that division by way of *petition*, *summons*, or *motion;* for, in the absence of any written agreement between the parties, the evidence in every such action is now given *viva voce*, as in the King's Bench Division (*n*). But on any petition, summons, or motion, the evidence must be given by *affidavit*, subject to any order of the court on the application of either party for the cross-examination of the deponent. As regards what is and what is not evidence, and as regards the admissibility of evidence, and as regards the weight of the evidence when admitted, and generally as regards all the rules of evidence, the Chancery Division is in entire agreement with the King's Bench Division.

IV. *The Judgment.*—There is usually a very great difference between a Chancery judgment, or decree, and a King's Bench judgment; the latter judgment being, usually, that this or that chattel be given up, or that such and such land or money or costs be recovered, whereas in the Chancery Division, the judgment must be adapted to the nature of the relief prayed, the minutes thereof being taken down by the registrar, and being afterwards drawn up in the presence of the parties or their solicitors, and being ultimately, if need should arise, settled by the judge himself. Also, in the Chancery Division, before a final judgment can be given, it frequently happens, that long accounts have to be taken, incumbrances and debts

(*m*) Ord. XXXVI. r. 4; *Warner* v. *Murdoch* (1877), 4 Ch. D. 750; *Wood* v. *Hamblet* (1877), 6 Ch. D. 113.

(*n*) Ord. XXXVII. r. 1; *Brooke* v. *Wigg* (1878), 8 Ch. D. 510.

inquired into, and other facts cleared up, the investigation of all which matters may be referred to a referee, but is more usually conducted at chambers, before one of the masters (*o*). In all these cases, the judge at the original hearing *adjourns the further consideration* of the action, until the accounts and inquiries directed to be gone into have been taken and made, and until the result thereof is reported to the judge by the referee or the master; and the judgment is afterwards given by the judge, on the basis of such report, the action being brought on for hearing on the further consideration which was adjourned (*p*).

This further consideration is brought on by motion for judgment, due notice of which must have been given, or, if the defendant has not appeared to the writ, filed in court. Upon the hearing, the court may adopt one or other of two courses, viz., if satisfied that it has before it all the materials necessary for finally determining the question or questions in dispute, it may give judgment accordingly (*q*); or, if not so satisfied, it may direct the motion to stand over for *further consideration*, and that in the meantime such issues or questions be tried, and such accounts and inquiries be taken and made, as it chooses to direct (*r*). And it is to be mentioned, that a large proportion of actions in the Chancery Division assume this character, being set down as motions for judgment, in order to take judgment thereon for accounts, inquiries, and the like without any trial; and almost invariably the further consideration of such actions is reserved. And many judgments in Chancery are obtained upon minutes of the proposed judgment passed between the respective counsel; while other judgments are obtained by consent simply. According to the practice in the Chancery Division, an action, to be taken as short, must

(*o*) Judicature Act, 1873, ss. 56, 57.

(*p*) Ord. XXXVI. r. 21.

(*q*) Ord. XL. r. 10.

(*r*) *Ibid.*

be so marked, and put in the proper list accordingly ; a copy of the proposed judgment being at the same time left with the papers.

V. *Execution.*—There were in use in the former Court of Chancery, special methods to enforce the performance of an order or decree, viz., *attachment* of the person, and *sequestration* of the estate ; and these two writs are, in the Supreme Court Rules, enumerated among the methods by which judgments of the High Court of Justice may be enforced, and they are directed to have the same effect as previously in the Court of Chancery. And these two special writs, although not generally applicable to an ordinary legal action, wherein the usual judgment is only for the recovery of land or of money, are still in use in the Chancery Division, to enforce the special judgments and orders of that Division. For example, when the order directs the payment of money into court to the credit of an action, or is for the recovery of some property, other than land or money, withheld by the defendant, or requires anyone to do something, other than to pay money, or to abstain from doing something, all such judgments are properly enforceable by one or other, and sometimes by both, of the two writs we have mentioned (*s*).

A *distringas notice* and a *stop-order* are also frequently met with in connection with Chancery proceedings. A distringas notice (in lieu of the old *writ of distringas*) is a notice served upon the Bank of England, or on any other company (*t*), to stay the transfer of stock or shares in the bank or company (*u*) ; and the notice holds good for five years, unless it is sooner ended by notice to the contrary. Within eight days after service of the *distringas notice*, the party who served the distringas may apply for an injunction to stay the transfer of

(*s*) Judicature Act, 1884, s. 14 ; Ord. XLII. r. 30.

(*t*) Ord. XLVI. r. 3.

(*u*) *Ibid.* r. 4.

the stock or shares (*x*). A stop-order is lodged against moneys or securities which are in court, and it is usually obtained by the assignee of some beneficiary entitled to some share in the moneys or securities. The object of the stop-order is to prevent the funds being transferred without notice to the assignee (*y*).

As already pointed out (*z*), a receiver may be appointed in certain cases for the purpose of enforcing a judgment. This appointment is in the nature of *equitable execution* on the judgment debt (*a*), and is available when it is desired to obtain satisfaction of the judgment debt out of certain specific property (real or personal) of the debtor, and the ordinary legal execution by *fi. fa.* or by *elegit* is not readily available, in respect of that specific property (*b*). This mode of execution being, however, an expensive proceeding, it is not to be resorted to, unless where the amount of the judgment debt justifies the expense; for it is not "just or convenient" to incur such expense on a judgment for an inconsiderable amount, and the expense will, in a proper case, be limited (*c*). In all cases where a receiver is appointed by way of equitable execution, the appointment operates to charge the specific property, that is to say, the judgment debtor's interest therein; and, consequently, the order appointing the receiver is expressed to be without prejudice to any existing charge or incumbrance on such property (*d*).

Secondly, actions in the Chancery Division may be commenced by ORIGINATING SUMMONS. An Originating

(*x*) Ord. XLVI. r. 10.

(*y*) *Ibid.* r. 13; *Mutual Life* v. *Langley* (1884), 26 Ch. D. 686.

(*z*) *Ante*, p. 632.

(*a*) *Harris* v. *Beauchamp Brothers*, [1894] 1 Q. B. 801; *Atkins* v. *Shephard* (1889), 43 Ch. D. 131.

(*b*) *Smith* v. *Cowell* (1880), 6 Q. B. D. 78; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275.

(*c*) Ord. L. r. 15A; Practice Rules (K. B. D.); Regulations sanctioned by K. B. D. judges, *Yearly Supreme Court Practice*, 1903, p. 501.

(*d*) *Underhay* v. *Read* (1887), 20 Q. B. D. 209; R. S. C. App. K. Nos. 62, 63 (1883).

Summons means any summons other than a summons in a pending cause or matter; and proceedings by originating summons are very common in the Chancery Division of the court. For example, under Order LV., rule 3, executors, administrators, and trustees, and also creditors and the assignees of creditors, may, without claiming a general administration of the estate, or a general execution of the trusts, issue such a summons for any of the following purposes, viz.:—(1) the determination of any question affecting beneficiaries or creditors of persons claiming to be such; (2) the ascertainment of beneficiaries and creditors; (3) the taking of accounts by executors or administrators or by trustees; (4) the payment into court of moneys in their hands; (5) the direction and control of executors, administrators, and trustees; (6) the approval of sales, purchases, compromises, &c.; and (7) generally, the determination of any question arising in the administration of the estate, or in the execution of the trust.

Where the executor or trustee is the applicant, he serves the summons on *the beneficiary or creditor* affected thereby (*e*); and if the applicant is a beneficiary or a creditor, or the assignee of either, he serves his summons on the executor or trustee (*f*). And, the summons having been duly issued and served, the day and hour for attendance are, after appearance, fixed by notice sealed at the chambers of the judge (*g*). The summons is supported by evidence, such evidence as the nature of the application requires being adduced by affidavit in support of the application (*h*); and the judge, unless he should adjourn the matter into court (which in many cases he does), pronounces such judgment on the summons as he considers the nature of the application requires, adding any such special directions as he may think expedient (*i*).

(*e*) Ord. LV. r. 5.
(*f*) *Ibid.*
(*g*) Ord. LIV. r. 4 (d) (Aug. 1894).
(*h*) *Ibid.* r. 7.
(*i*) *Ibid.* rr. 8, 9.

Again, under Order LV. rule 5A, any mortgagee or mortgagor, whether legal or equitable, or any person entitled to a legal or equitable charge on property, or the person entitled to the property subject to such charge, may issue an originating summons, for such relief of the nature and kind appropriate to the case, such as sale, foreclosure, and delivery of possession by the mortgagor; or redemption, re-conveyance, and delivery of possession by the mortgagee. And the parties to such a summons will be all the persons who would have been the proper parties in an ordinary foreclosure or redemption action commenced by writ (*k*); and the summons is issued and served, and the evidence in support thereof is adduced, and the summons itself is heard and disposed of, and judgment thereon given, exactly as upon an originating summons issued under Order LV. rule 3.

And under other rules, supplementary to Order LV., other relief of the like general character may be similarly obtained, *e.g.*, disputes under the Finance Act, 1894 (*l*), may be so determined (*m*).

(*k*) Ord. LV. r. 5B.
(*l*) 57 & 58 Vict. c. 30.
(*m*) Ord. LV. r. 9C (Nov. 1895).

CHAPTER XVI.

OF PROCEEDINGS IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

It is necessary, in treating of the proceedings in this Division, that we should treat separately,—I. Of a Probate Action; II. Of a Divorce Petition; and III. Of an Admiralty Action,—it being understood that, unless where the contrary is stated, the course of an action is the same in this Division as in the King's Bench Division.

I. *Probate Action.*—The business relating to probate and administration, originally transacted in the Ecclesiastical Courts, afterwards in the Court of Probate created by the Court of Probate Act, 1857, and subsequently transferred to the High Court of Justice, and assigned to the Probate, Divorce, and Admiralty Division, was twofold in its character, being partly *non-contentious* and partly *contentious*. Of the non-contentious business (otherwise termed the *common form business*) (*a*), and of the practice therein, we do not propose to take any specific notice, as it consists chiefly of matters of detail, which must be sought in the books of practice (*b*); but we may state generally, that it comprises the grant of probate or administration by the court, through the medium of the principal registry or of the district registries, in respect of the property in *England* which belonged to anyone (whether a British subject or not) at the time of his or her

(*a*) Common form (or non-contentious) business includes the *warning of caveats* entered against a grant of probate or administration (Court of Probate Act, 1857, s. 2).

(*b*) *E.g.*, Coote, *Common Form Practice*, by Tristram.

death (*c*). This non-contentious jurisdiction has not been affected by the Judicature Acts (*d*).

We proceed to speak now of the *contentious* business of the Probate Division. If any one (*e.g.*, any next of kin), who has an interest in the estate of a deceased person, desires to oppose the grant of probate or of letters of administration, he must enter a "caveat" in the principal registry, or in the proper district registry. A "caveat" is a formal notice to the registry of the court, demanding that nothing be done in the goods of the deceased unknown to him who takes out the caveat, inasmuch as he is a party interested in the estate (*e*). He, therefore, who is desirous that a grant may issue, "warns the caveat"; *i.e.*, the court at his instance warns him who took out the caveat, that unless he within six days "enters an appear-"ance" to the caveat he has taken out, and therein sets forth his interest in the estate, the court will nevertheless proceed in the matter. Upon this appearance being entered, the matter is entered as a cause in the court book, and the "contentious business" is held to have thereupon commenced (*f*). He who took out the caveat then issues a writ, having first filed an affidavit verifying the indorsement on the writ. A citation is also sometimes necessary; and the citation is, in general, a command issuing from the principal registry, ordering the party against whom it issues, and on whom it must be served, to do what is required of him, as, for example, to accept or

(*c*) *In the Goods of Coode* (1867), L. R. 1 P. & D. 449. It will be recollected that, since the Land Transfer Act, 1897 (60 & 61 Vict. c. 65, s. 1) heritable real estate (other than copyholds) vested in any person, without a right of survivorship in any other person, vests on his death in his personal representative or representatives, and may, therefore, be the proper subject-matter of a grant of probate.

(*d*) *Peacock* v. *Lowe* (1867), L. R. 1 P. & D. 311; *Kennaway* v. *Kennaway* (1876), 1 P. D. 148; *In the Goods of Tomlinson* (1881), 6 P. D. 209.

(*e*) R. 72 (Non-Contentious Business). See, *per* LINDLEY, L.J., in *Moran* v. *Place*, [1896] P. 214.

(*f*) R. 12 (Contentious Business).

refuse probate or administration, or to bring in the probate or administration which the court has already granted, or it may be simply "to see proceedings," *i.e.*, to become a party to a suit, in order that the decree of the court may be binding on him. If the action is for revocation of probate, then it is the practice not only to extract a citation, but also to issue a writ; for, by Order I., rule 1 of the Supreme Court Rules, "all actions which, previously "to the commencement of the principal Act," *i.e.*, the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), "were commenced by . . . citation or other- "wise in the Court of Probate, shall be instituted . . . "by a proceeding to be called an action"; and by section 100 of the Judicature Act, 1873, "action" means a civil proceeding commenced by writ. But by Order I., rule 2, "All other proceedings . . . may be taken in "the same manner as they would have been taken if the "[principal Act and its amending] Acts had not been "passed." And although Order XVI., rule 11, provides, that the court may order the striking out or adding of parties at any stage of the proceedings, yet it has been held, that this rule has in no way affected the practice of the Probate Division as to the citing of persons (*g*). Hence arises the practice of issuing a writ and also a citation; and every suit for revocation of a grant of probate or administration commences with a citation, which should be extracted before, or concurrently with, the writ of summons.

If it appears likely that the validity of a will may be disputed, or if for any other reason the ordinary grant of probate is not suitable to the circumstances of the case, the executor named in the will proceeds to propound it *in solemn form*, or *per testes* (*h*). This process is, virtually, an action in the Probate Division against all persons likely to dispute the will. In such an action, the indorse-

(*g*) *Kennaway* v. *Kennaway* (1876), 1 P. D. 148.

(*h*) See, *ante*, vol. II. p. 237.

ment on the writ states, that "the plaintiff claims to be "the executor of the last will dated the day of , "19 , of John Doe, gentleman, who died on the day "of , 19 , and to have the said will established." It must, however, further state, in what capacity the defendants are made defendants,—*e.g.*, "This writ is "issued against you as one of the next of kin" of the said deceased,—or in whatever other capacity it may happen to be. After the writ and citation, there follow the pleadings; and, in order to obtain a general idea of the pleadings, we will suppose, that the statement of claim, which is the first pleading, sets forth the due making and execution of his last will by the testator, he being at the time of sound disposing power, and the due attestation of such will, whereby the plaintiff was appointed sole executor of the will; and we will suppose that the statement of claim then proceeds to claim, as it will do, that the court may decree probate of the will in solemn form. To such a statement of claim, the defendant may, in his defence, raise all or any of the following defences:—(A.) That the will was not duly executed according to law, *i.e.*, according to the provisions of the Wills Act, 1837, (1 Vict. c. 26); (B.) That the deceased, at the time of the execution of the will, did not know and approve of its contents; (C.) That the deceased, at the time when the will purports to have been executed, was not of sound mind, memory, and understanding; and (D.) That the execution of the will was obtained by the undue influence of the plaintiff. And the defendant may allege, by way of counterclaim, that he is the executor of a later will of the deceased than that which the plaintiff is propounding; and, in that case, he prays, that the plaintiff's will may be pronounced against, and that probate of the will which he is setting up may be granted in solemn form of law.

We have already explained in detail the forms essential to the validity of a will, and the general legal capacity of

different classes of persons to make wills (*i*) ; but it may be as well to advert here, briefly, to certain facts which may invalidate an apparently regular will, and which may, as we have just supposed, be alleged in opposition to a claim of probate in solemn form. Thus, with regard to the testator's capacity to make a will, three essentials are requisite : (1.) He must understand the nature of his act and its effects ; (2.) He must understand the extent of the property that he is disposing of ; and (3.) He must be able to comprehend and appreciate the claims to which he ought to give effect (*k*). And as regards the testator's being of sound mind, memory, and understanding, the law holds that the mere fact of a man having an insane delusion does not *ipso facto* deprive him of his disposing power ; but if the delusion has not influenced him in the disposal of his property, he is, notwithstanding his malady, deemed competent to make a will (*l*).

As regards the defence of *undue influence*, it does not follow that, because one person has unbounded influence over another, it is *undue* in the legal sense of the word. To quote the words of eminent judges, " a young man may be caught " in the toils of a harlot who makes use of her influence to " induce him to make a will in her favour to the exclusion " of his relatives. It is, unfortunately, quite natural that a " man so entangled should yield to that influence, and con- " fer large bounties on the person with whom he has been " brought into such relations ; yet the law does not attempt " to guard against those contingencies. . . . To be " undue influence in the eye of the law there must be—to " sum it up in a word—coercion" (*m*). " A testator may " be led but not driven ; his will must be the offspring of " his own volition and not the record of someone else's.

(*i*) *Ante*, vol. II. pp. 231—235.

(*k*) *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B., at p. 565.

(*l*) *Boughton* v. *Knight* (1873), L. R. 3 P. & D. 64 ; *Pilkington* v. *Gray*, [1899] A. C. 401.

(*m*) *Wingrove* v. *Wingrove* (1885), 11 P. D. 81, *per* HANNEN, J.

" Pressure of whatever character, whether acting on the " fears or the hopes, *if so exerted as to overpower the volition* " *without convincing the judgment*, is a specimen of restraint " under which no valid will can be made. Importunity " or threats, such as the testator has not courage to resist, " moral command asserted and yielded to for the sake of " peace and quiet, or of escaping from distress of mind or " social discomfort, these, *if carried to a degree in which the* " *free play of the testator's judgment, discretion, or wishes* " *are overborne*, will constitute undue influence, though no " force is either used or threatened " (*n*).

On these or similar defences, issue will be joined, unless the plaintiff should go on to allege, in his reply, that the earlier will set up was afterwards revoked (*o*). But sometimes the defendant, in his defence, will merely insist upon the will set up being proved in solemn form of law, intimating to the plaintiff, that he only intends to cross-examine the witnesses produced in support of the will (*p*).

By leave of the court or a judge, the writ of summons may be served out of the jurisdiction (*q*); and anyone not named in the writ may, on filing an affidavit showing how he is interested in the estate, *intervene* and appear in the action (*r*). If the defendant makes default in pleading, the probate action proceeds notwithstanding such default (*s*); and is conducted in much the same way as an ordinary common law action. If on the facts proved, and the law applicable to them, the court is of opinion that any of the wills propounded are valid, it " pronounces " for them; and such will or wills is or are then deemed to be " proved " in solemn form." If not, the deceased will be deemed to have died intestate, unless, at a later stage, a new will should be set up. An appeal lies from the judgment of the court to the Court of Appeal (*t*).

(*n*) *Hall* v. *Hall* (1868), L. R. 1 P. & D. 481; *per* WILDE, J.

(*o*) *Parton* v. *Johnson* (1868), L. R. 1 P. & D. 549.

(*p*) Ord. XXI. r. 18.

(*q*) Ord. XI. r. 3.

(*r*) Ord. XII. r. 23.

(*s*) Ord. XXVII. r. 10.

(*t*) *Sugden* v. *Lord St. Leonards* (1876), 1 P. D. 154.

II. *Divorce Petition.*—The proceedings in divorce and matrimonial causes are commenced by the filing of a petition, which is addressed to the President of the Probate, Divorce and Admiralty Division. The petition sets out, shortly and concisely, when and where the parties were married, and where they have cohabited ; and states what issue there has been of the marriage. The matrimonial offences relied on, with the dates when, and the places where, they were committed, are then tabulated in paragraphs in chronological order ; and the petition concludes with a prayer for the relief sought for by the petitioner. The petition must be verified by affidavit ; and the petitioner must swear to the truth of the statements in his petition, in so far as they are within his personal knowledge, and to his belief in the truth of those that are not (*u*). In suits for dissolution, judicial separation, jactitation, and nullity of marriage, the petitioner must further swear, that no collusion or connivance exists between him and the respondent (*x*). So soon as the petitioner has filed his petition and affidavit he must forthwith "extract a citation" (*y*), a citation being a command, drawn in the name of the King and signed by one of the Registrars of the Court, calling upon the alleged offender to appear and make answer to the petition; and it warns him that, in default of his so doing, sentence will be pronounced notwithstanding his absence. The citation must be served personally ; or, if that cannot be done, application must be made to the court, by motion founded on affidavit, for leave to dispense with service (*z*). If the petition be presented by a husband praying for a dissolution of his marriage on the ground of adultery, the alleged adulterers must be made co-respondents, unless the court gives leave to proceed without making them co-respondents, which it will do on its being moved by the

(*u*) Divorce Rules, 2.
(*x*) Rule 3.
(*y*) Rule 8.
(*z*) Rules 10—13 ; *Williams* v *Williams*, [1896] P. 153.

petitioner, and on being satisfied that there is good reason for their being dispensed with (*a*). The husband may also claim damages against the adulterers ; but such damages are not awarded by way of a penalty to punish the adulterer for the wrong he has done, but rather by way of compensation to the petitioner for the loss he has sustained by the ruin of his wife (*b*). Hence the jury must consider what was the value of the wife to the petitioner.

In all cases where damages are claimed, the petition must be tried by a jury, on whom falls the duty of assessing the amount. The petitioner may claim what amount of damages he thinks fit, and must specify in the petition the amount he claims (*c*). But it is not the practice to allow the counsel for the petitioner to inform the jury what that amount is, though, in case the jury assess a greater sum than that which the petitioner claimed, the court will generally grant leave to amend the prayer in that respect (*d*). The manner in which the damages shall be paid or applied is subject to the directions of the court ; and, if the court thinks fit, it may order the whole of the damages, or any part thereof, to be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife (*e*). Within the prescribed time after the service of the petition, each respondent who has entered an appearance, may file in the registry an answer to the petition (*f*) ; and if such answer contain matter other than a simple denial of the facts stated in the petition, an affidavit must be filed with it verifying the additional matter. If it is an answer to a petition

(*a*) Rules 4—7 ; *Appleyard* v. *Appleyard and Smith* (1875), L. R. 3 P. & D. 257 ; *Barber* v. *Barber*, [1896] P. 73 ; *Edwards* v. *Edwards*, [1897] P. 316.

(*b*) Matrimonial Causes Act, 1857, s. 33. *Cowing* v. *Cowing and Wollen* (1863), 33 L. J. P. D. & A. 149 ; *Evans* v. *Evans*, [1899] P. 195.

(*c*) *Pegler* v. *Pegler* (1901), 85 L. T. 649.

(*d*) *Beckett* v. *Beckett*, [1901] P. 85.

(*e*) Sect. 33.

(*f*) Rules 19—28.

for dissolution, nullity, judicial separation, or jactitation, the affidavit must further state, that there is not any collusion or connivance between the deponent and the petitioner (*g*). In cases where the answer is more than a simple denial of the allegations, the petitioner admits, or puts in issue, the fresh facts therein alleged by filing a reply (*h*).

And here it will be convenient to refer more specifically to the defences available in the suit for a divorce ; which defences are eight in number, and are either (1) *Absolute Bars ;* or (2) *Discretionary Bars.* And, first, the Absolute Bars are (A.) Condonation ; (B.) Connivance ; and (C.) Collusion (*i*).

(A.) By "condonation" is meant forgiveness of the conjugal offence complained of, with a full knowledge of all the circumstances. A continuance of the marital intercourse would justify the inference that the offence had been condoned (*k*).

(B.) By "connivance" is meant the actual acquiescence in the respondent's guilt by the petitioner (*l*).

(C.) By "collusion" is meant the entering into an agreement by the parties to the suit, as to what evidence shall or shall not be laid before the court ; for example, to agree that the respondent shall abstain from defending the suit constitutes collusion (*m*).

If, therefore, a respondent or co-respondent proves the condonation or connivance of the petitioner, or they are themselves found to be in collusion with him, the court can not grant a decree.

Secondly, the Discretionary Bars are, (D.) The un-

(*g*) Rules 30, 31.

(*h*) Rules 32, 33.

(*i*) Matrimonial Causes Act, 1857, s. 31.

(*k*) *Peacock* v. *Peacock* (1858), 1 Sw. & Tr. 184 ; *Keats* v. *Keats and Montezuma* (1859), 28 L. J. P. D. & A. 57.

(*l*) *Phillips* v. *Phillips* (1844), 1 Robertson, 144 ; *Allen* v. *Allen and D'Arcy* (1859), 30 L. J. P. D. & A. 2.

(*m*) *Churchward* v. *Churchward*, [1895] P. 7.

reasonable delay of the petitioner in presenting or prosecuting his petition; (E.) The cruelty of the petitioner to the respondent; (F.) The desertion or wilful separation without reasonable excuse of the petitioner from the respondent, prior to the misconduct complained of; (G.) The wilful neglect or misconduct of the petitioner, which has conduced to the respondent's adultery; and (H.) The adultery of the petitioner (*n*).

(D.) By "unreasonable delay" is meant a delay of two years after the discovery of the existence of the fact on which the divorce is claimed; and unless a satisfactory explanation can be given of it, the petitioner is not entitled to a divorce (*o*). Want of means is, however, considered a satisfactory explanation (*p*).

(E.) By "cruelty" is meant such conduct as results in bodily hurt or injury to health, or a reasonable apprehension of one or other of these (*q*). The principle on which the court exercises its discretion in favour of, or adversely to, a petitioner who is found guilty of cruelty towards the respondent, is to ask itself, whether such cruelty has or has not been the cause of the misconduct complained of in the respondent (*r*); but the court is not absolutely limited by the general rule (*s*).

(F.) As regards "desertion," when pleaded as a bar to divorce, it is not necessary that the desertion should have continued for the space of two years, or for any specific period (*t*); the act relied on as desertion must, however, in all cases have been done in opposition to the wishes of the person who alleges it (*u*).

(*n*) Matrimonal Causes Act, 1857, s. 31.

(*o*) *Nicholson* v. *Nicholson* (1873), L. R. 3 P. & D. 53; *Beauclerk* v. *Beauclerk*, [1895] P. 220; *Synge* v. *Synge*, [1901] P. 317.

(*p*) *Harrison* v. *Harrison* (1864), 33 L. J. P. D. & A. 44.

(*q*) *Per* Lord HERSCHELL in *Russell* v. *Russell*, [1897] A. C. 456.

(*r*) *Pearman* v. *Pearman and Burgess* (1860), 29 L. J. P. D. & A. 54.

(*s*) *Pryor* v. *Pryor*, [1900] P. 157.

(*t*) *Williams* v. *Williams* (1864), 33 L. J. P. D. & A. 172.

(*u*) *Ward* v. *Ward* (1858), 27 L. J. P. D. & A. 63; see *Sickert* v. *Sickert*, [1899] P. 278.

(G.) With regard to the "wilful neglect or misconduct" of the petitioner, the principle on which the court acts is, that it must *directly* conduce to the adultery complained of; for many circumstances are conceivable which may indirectly conduce to that, but these would be insufficient (*x*).

And (H.) With regard to the adultery of the petitioner, the court will only overlook his misconduct so as to grant him a divorce in three classes of cases:—First, where there has been a mistake of law (*y*); Secondly, where there has been a mistake of fact (*z*); and Thirdly, under special circumstances (*a*).

In all petitions for divorce, before the court proceeds to grant the relief a petitioner seeks, it must be satisfied, that he is domiciled within the jurisdiction of the court,—*i.e.*, that he has in England a fixed permanent home, and one to which, when absent from it, he intends to return. For the court is a court for England only, not a court for the United Kingdom or Great Britain; and, for the purposes of jurisdiction, Ireland and Scotland are deemed to be foreign countries equally with France or Spain (*b*). So, likewise, the Channel Islands (*c*) and the Isle of Man (*d*) are not within the jurisdiction.

Where the attendance of the witnesses can be procured, they are examined *viva voce* in open court at the time the petition is heard; though, in certain cases, and subject to the opportunity being given for the cross-examination and re-examination of the deponent in open court, the case of either party may be verified by affidavit. And,

(*x*) *Badcock* v. *Badcock* (1858), 1 Sw. & Tr. 189; *Symons* v. *Symons*, [1897] P. 167; *Burdon* v. *Burdon*, [1901] P. 52.

(*y*) *Noble* v. *Noble* (1869), L. R. 1 P. & D. 691; *Moore* v. *Moore*, [1892] P. 382.

(*z*) *Joseph* v. *Joseph and Wentzell* (1865), 34 L. J. P. D. & A. 96.

(*a*) *Morgan* v. *Morgan and Porter* (1869), L. R. 1. P. & D. 644.

(*b*) *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574; *Manning* v. *Manning* (1871), L. R. 2 P. & D. 223; *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517.

(*c*) 4 Inst. 286.

(*d*) *Durison* v. *Farmer* (1851), 20 L. J. Ex. 177.

under certain circumstances, the evidence of any particular witness may be taken under a commission, and such evidence made admissible at the trial (*e*).

The court has power to make orders on a husband for the payment of alimony or maintenance to the wife; and a wife who is desirous of obtaining such an order must file a petition for the purpose. If the wife is the petitioner in the cause, the petition for alimony must not be presented before the citation has been duly served upon the respondent; if, however, she is respondent in the cause, she may file it so soon as she has entered an appearance (*f*). The husband may then file an answer upon oath, setting out what his means are; and the matter is then dealt with by the registrar of the court. If a wife has means of support independently of her husband, she is not entitled to an allotment of alimony; and this, even though that support is derived from the co-respondent (*g*). The amount allotted is discretionary, the circumstances of each case being considered; but generally one-fifth of the joint income is allotted as alimony *pendente lite*, and one-third for permanent alimony.

With reference to the mode of trial, the registrar will, on due application, as soon as the pleadings are concluded, direct whether the action shall be tried by a jury or before the court itself, and whether by oral evidence or by affidavit (*h*); but, in cases of *divorce*, the trial must be in open court (*i*), and either party may insist on a jury.

When an issue is to be tried either by a special or by a common jury, the record is settled by the registrar, and the case set down for trial by the petitioner; or, in his

(*e*) Rules 51—55.

(*f*) Rules 81—90.

(*g*) *Holt* v. *Holt and Davis* (1868), L. R. 1 P. & D. 610.

(*h*) Rule 40.

(*i*) *C.* v. *C.* (1869), L. R. 1 P. & D. 640. As to the powers to hear certain cases *in camerâ*, see *D.* v. *D.*, [1903] P. 144.

default, this step may be taken by the respondent (*k*). And the trial takes place, in general, like the trial by a jury of an issue of fact in an ordinary action.

Any motion for a rehearing of a cause which has been heard before a judge without a jury, must be made to a Divisional Court of the Probate Divorce and Admiralty Division (*l*).

In other cases, an appeal from the decree, or a motion for a new trial, lies to the Court of Appeal (*m*), there being moreover, an ultimate appeal, in the case of a divorce suit, or for nullity of marriage, to the House of Lords (*n*).

The King's Proctor, or any other person, wishing to show cause against making absolute a decree *nisi* for a divorce—which we may remember is always the form of the decree first given on a petition for the dissolution of a marriage (*o*)—may enter an appearance, together with an affidavit of the facts on which he relies; to which the party in whose favour the decree *nisi* was given may file affidavits in reply, and the questions raised on such affidavits are argued before the judge, and, if the judge shall so direct, any controverted question of fact may be tried before a jury (*p*). But if, at the expiration of six calendar months, no person has appeared to oppose the decree, application may then be made to the judge to make such decree absolute (*q*); and if no application to make the decree absolute be made within a reasonable time, the respondent is entitled to apply to have the decree *nisi* revoked, and the petition dismissed for want of prosecution (*r*).

(*k*) Rule 46.

(*l*) *Smith* v. *Smith*, [1897] P. 293; *Watson* v. *Watson* (1903), 19 T. L. R. 567.

(*m*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9; *Westhead* v. *Westhead* (1876), 2 P. D. 1; *Gladstone* v. *Gladstone* (1877), *ibid.* 143.

(*n*) Matrimonial Causes Act, 1857, s. 56; Judicature Act, 1881, s. 9; *Butchart* v. *Butchart*, [1901] A. C. 266.

(*o*) *Ante*, vol. II. p. 328.

(*p*) Rules 70—76.

(*q*) *Ibid.* r. 80.

(*r*) *Ousey* v. *Ousey* (1875), 1 P. D. 56.

And, even during the progress of the cause, any person may give information to the King's Proctor of any matter material to the due decision of the case; and the King's Proctor may thereupon take such steps as the Attorney-General may think necessary or expedient, and may, by leave of the court, *intervene* in the suit. If he does so, he enters an appearance himself to the petition, and pleads collusion between the parties, on which plea an issue is raised and disposed of between himself and the petitioner. And this course may be taken at any time before the decree has been made absolute (*s*).

III. *Admiralty Action.*—This action is regulated by the rules in force in the old Court of Admiralty, modified, however, by the rules laid down under the Judicature Acts with regard to actions generally, some of which apply, in particular, to admiralty actions *in rem* (*t*). In an admiralty action *in personam*, the proceedings do not differ materially from the proceedings in an action in the King's Bench Division. As regards the action *in rem*, at any time after the writ of summons has issued, a warrant is also to issue, commanding the marshal of the court, or his substitute, or the collector of customs at such and such a port, to *arrest* the ship in respect of which the claim is made, or her cargo and freight, and to keep the same until further order (*u*). The warrant, however, must be preceded by an *affidavit*, setting forth certain particulars prescribed by the Orders, which vary according to the nature of the claim; but, in all cases, such particulars disclose the nature of the claim, and the name and description of the party on whose behalf the action is instituted, and allege that the claim has not been satisfied (*x*). The defendant may, however, upon giving bail to the action,

(*s*) Matrimonial Causes Act, 1860, s. 7; *Le Sueur* v. *Le Sueur* (1877), 2 P. D. 79.

(*t*) The former rules of *pleading* in the Admiralty Court are wholly superseded (Ord. XIX. r. 1).

(*u*) Ord. V. r. 16; App. A. part i. No. 17.

(*x*) Ord. V. r. 16.

cause a *caveat* to be entered against the arrest (*y*); and the claim to arrest will be disposed of on the argument of *caveat*.

In an admiralty action *in rem*, the service of the writ is effected by nailing or affixing the writ itself on the mast of the vessel, or on the cargo, if removed from the ship; which service is in lieu of the personal service required in other actions (*z*).

If no appearance was entered to the writ of summons, then, in cases where no property was claimed in the *res*, and it had been arrested, it might be sold after notice, and the proceeds brought into court, or, if the property therein was claimed, the possession thereof might be decreed in the defendant's absence (*a*); and *if the defendant appeared, but failed to deliver a statement of defence*, the plaintiff's course was to deliver a "conclusion," and to set down the action for hearing (*b*). But, under the present practice (*c*), if on default of appearance, the judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim, with or without a reference to the admiralty registrar, or to such registrar assisted by merchants, and may at the same time order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into court; and on default of pleading, the practice is as in an ordinary action (*d*).

In an admiralty action *in rem*, any person, not named in the writ of summons, may *intervene* and defend the action, on filing an affidavit showing either that he is interested in the *res* under arrest; or, should the arrest be taken off (as it may be, on sufficient money being paid into the registry of the court to satisfy the claim and costs), that he is interested in the fund so paid in (*e*).

(*y*) Admiralty Rules, 1859, rr. 55—61.

(*z*) Ord. IX. rr. 11, 12.

(*a*) *The Polymede* (1876), 1 P. D. 121.

(*b*) *The Sfactoria* (1876), 2 P. D. 3; Rules, 1859, rr. 75, 80, 105.

(*c*) Ord. XIII. r. 13.

(*d*) Ord. XXVII. r. 11.

(*e*) Ord. XII. r. 24.

In the particular case of an action for *damage by collision* between vessels, the solicitors on either side are required to file in court a sealed up document called a "preliminary act," before the delivery of any pleadings. This preliminary act contains a statement as to certain facts relative to the description of the vessels, and the circumstances of the collision ; and it may, with the consent of both parties, be opened, and the evidence taken thereon by order of the court or a judge, without the necessity of delivering any pleadings in the action (*f*). The object of this rule is to obtain a statement of the facts as soon as possible after the collision has taken place, so as to prevent either party from afterwards varying his version of the facts, in order to meet the allegations of his opponent (*g*).

In admiralty actions, whether *in rem* or *in personam*, the court or a judge may, at any stage of the proceedings, on application by either party, call on the other to show cause, why the trial should not take place at some early day to be appointed ; and for that purpose, the court may dispense with notice of trial, and may otherwise vary the usual regulations as to bringing on an action for trial (*h*). The trial in admiralty actions is almost invariably before the judge alone, or before the judge sitting with two of the Trinity masters as assessors to advise him on questions of a nautical character, though the decision given is that of the judge himself ; and it is not usual to have recourse to a jury. But should one of the parties ask for a jury, he is entitled to have one, unless the other party asks for assessors ; in which case, the trial must be by judge and assessors (*i*).

In an admiralty action tried before the judge, the court does not itself,—any more than does the judge in a chancery

(*f*) Ord. XIX. r. 28; *The Why Not* (1868), L. R. 2 Adm. & Ecc. 265; *The Godiva* (1886), 11 P. D. 20.

(*g*) Williams & Bruce, *Ad. Prac.* (3rd ed.) 369.

(*h*) Ord. LXIV. r. 9.

(*i*) *The Tynwald*, [1895] P. 142.

action,—generally enter into matters of detail relating to the assessment of damages or matters of account; and whenever, in the course of a trial, it becomes necessary that the court should be informed upon such questions, it is usual to direct a reference to the registrar, assisted by merchants (*k*), a practice which, however, must be now taken as subject, in the general case, to the power of the court to direct inquiries, and to make orders of a cognate nature, conferred by the Judicature Acts.

An *appeal* in an admiralty action lies to the Court of Appeal, as in an ordinary action in the Chancery Division of the High Court; and there is an ultimate appeal to the House of Lords. But where the judge has come to a conclusion of fact after hearing witnesses, his decision will not be reversed, except under very exceptional circumstances (*l*).

(*k*) Rules, 1859, rr. 107—118.

(*l*) *The Glannibanta* (1876), 1 P. D. 283; *The P. Caland*, [1893] A. C. 207.

CHAPTER XVII.

OF PROCEEDINGS AFFECTING THE CROWN.

[We have now to consider the manner of redressing civil injuries, in cases where the Crown, either as the aggressor or as the sufferer, is concerned ; and we shall consider, first, those injuries which a subject may suffer from the Crown, and, secondly, those which the Crown may sustain from a subject.

I. *Injuries by the Crown.*—Although the king can in his own person do no wrong, yet his acts may in themselves be contrary to law ; and whenever, by misinformation or inadvertence, the king hath been induced to invade the private rights of the subject, and becomes informed of the injury sustained, the law always then presumes, that to know of the injury and to redress it are inseparable in the royal breast, and issues, as of course, in the king's own name, an order to his judges to do justice to the party aggrieved.

The distance between the sovereign and his subjects is such, that it rarely can happen that any *personal* injury can proceed from the prince to any private man ; and the law in decency supposes, that such injury never can or will happen at all. But injuries to a private individual's right of *property* may be committed by the Crown, though scarcely without the intervention of its officers ; and for these officers the law, in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting their errors or misconduct. But inasmuch as, in ordinary cases, the king himself is the medium through

[which justice is obtained, so no relief can be had, against the Crown, by *action* (*b*) ; therefore the relief is obtainable only by means of such special forms of proceeding as the law has provided in that behalf.

The method of obtaining possession or restitution from the Crown, of real or personal property (*c*), or damage for breach of contract (*d*), is by petition of right (*petition de droit*) (*e*), which remedy is applicable when the Crown is in possession of any hereditaments or chattels, and the petitioner suggests such right as controverts the title of the Crown, grounded on facts disclosed in the petition itself. And upon the petition the answer, "*soit droit fait al partie*"—*let right be done to the party*—is endorsed or underwritten by the Crown (*f*), and the attorney-general is at liberty to plead ; and the merits are afterwards determined upon some issue of fact or of law, as in actions between subject and subject. For example, if a disseisor of lands which are holden of the Crown dies seised and

(*b*) Jenkins, 78 ; Finch, L. 83 ; Bac. Ab. *Prerog.* E. 7.

(*c*) Neither an action for damages, nor a petition of right, lies *against the Crown*, to recover compensation for a *tort* (or wrongful act) done by a servant of the Crown in the supposed performance of his duties (*Tobin* v. *The Queen* (1864), 16 C. B. (N.S.) 310 ; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73 ; cf. *Nireaha Tamaki* v. *Baker*, [1901] A. C. 561 ; but it is otherwise for a breach of *contract* (*Thomas* v. *The Queen* (1874), L. R. 10 Q. B. 31 ; *Kinloch* v. *Secretary of State for India* (1882), 7 App. Ca. 619 ; *The Windsor* (*Canada*) *Rail. Co.* v. *The Queen* (1886), 11 App. Ca. 607 ; *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555 ; *Graham* v. *Works, etc. Commissioners*, [1901] 2 K. B. 781.

(*d*) *Thomas* v. *The Queen*, *supra* ; *Churchward* v. *The Queen* (1865), L. R. 1 Q. B. 173 ; *Rustomjee* v. *The Queen* (1876), 1 Q. B. D. 487 ; 2 *id.* 69.

(*e*) There was also another writ against the Crown, called a *monstrans de droit*, which was applicable where the Crown was in possession under a title the facts of which were already set forth on record ; and Blackstone says (vol. iii. p. 256), that, by this writ, the process on which was speedier and cheaper than the process on *petition*, the petition of right became almost superseded. (See also 4 Rep. 55 ; Bac. Ab. tit. *Prerog.* E. 7 ; Co. Entr. 402 Skin. 608 ; Chitty, *Prerogative*.)

(*f*) St. Tr. vii. 134.

[without any heir, whereby the Crown is *primâ facie* entitled to the lands, and the possession is cast on it, either by inquest of office, or by act of law without any office found, the disseisee shall have remedy by petition of right, suggesting the title of the Crown, and his own superior right *before the disseisin* (*g*). And in case the right be determined against the Crown, the judgment used to be that of *ouster le main*, or *amoveas manus*,—viz., "*quod manus domini regis amoveantur, et possessio resti-*" *tuatur petenti, salvo jure domini regis*" (*h*), which saving clause was always added to a judgment against the king, to whom no laches can be imputed ; and whose rights, save under some modern statutes, is never defeated by any limitation or length of time (*i*) And by such judgment, the Crown was instantly out of possession ; so that there needed not the interposition of its own officers, as upon an ejectment, to transfer the seisin from the king to the aggrieved party (*k*).]

The proceedings upon a petition of right, which at one time were extremely tedious and expensive, are now regulated by the Petition of Right Act, 1860 ; and under that statute, the petition is required to be left with the secretary of state for the home department, for his Majesty's consideration, who may thereupon grant his fiat that right be done. Thereupon (the fiat having been served on the solicitor to the treasury) an answer, plea, or other defence is made on behalf of the Crown ; the subsequent proceedings being assimilated, so far as practicable, to the course of an ordinary action (*l*). And, in cases in which a judgment of *amoveas manus* would for-

(*g*) Bro. Ab. tit. *Petition*, 20 ; 4 Rep. 58.

(*h*) 2 Inst. 695 ; Rast. Ent. 463.

(*i*) Finch, L. 460 ; 2 & 3 Edw. 6 (1548), c. 8, s. 14.

(*k*) Finch, L. 459.

(*l*) The suppliant is not entitled to obtain discovery of documents, or any other discovery (*Thomas* v. *The Queen* (1874), L. R. 10 Q. B. 44), but the Crown is (*Att.-Gen.* v. *Newcastle Corporation*, [1897] 2 Q. B. 384).

merly have been given on a petition of right, a judgment that the suppliant is entitled to the whole or some portion of the relief sought by his petition, or to such other relief, and on such terms and conditions, as the court may think right, is given instead, which judgment has the same effect as a judgment of *amoveas manus* (*m*). And upon any petition of right under the Act, *costs* are payable both to and by the Crown, subject to the same rules, so far as practicable, as obtain in proceedings between subject and subject (*n*). Nothing in the Act prevents, however, any suppliant from proceeding as he might have done before it passed.

[II. *Injuries to the Crown.*—The method of redressing such injuries as the Crown may receive from the subject may be by such actions as are consistent with the royal prerogative and dignity ; but more effectual remedies are usually obtained, by such prerogative modes of process as are peculiarly confined to the Crown (*o*). And among these prerogative methods, is that of *inquisition* (or *inquest*) *of office* (*p*), which is an inquiry made by the king's officer, his sheriff, coroner, or escheator, either *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the Crown to the possession of lands or tenements, goods or chattels. And this is done by a jury of no determinate number, being either twelve, or less, or more (*q*). And the inquisition is to inquire whether

(*m*) Petition of Right Act, 1860, ss. 9, 10.

(*n*) Sect. 12.

(*o*) It is said in the books, that the king cannot bring ejectment, because that action supposes the dispossession of the plaintiff, whereas (in contemplation of law and by reason of his legal ubiquity) the Crown can never be dispossessed ; but the Crown may bring *quare impedit*, because that supposes the plaintiff to be seised or possessed of the advowson (Bro. Ab. tit. *Prerog.* 89, 130; F. N. B. 90 ; Y. B. 4 Hen. 4, pl. 4 ; *Att.-Gen.* v. *Lord Churchill* (1841), 8 M. & W. 171).

(*p*) Petty Bag Act, 1849, ss. 30 *et seq.* ; *Dean* v. *The Queen* (1846), 15 M. & W. 475.

(*q*) Finch, L. 323 *et seq.*

[(*e.g.*) the Crown's tenant for life died seised, whereby the reversion accrues to the king; or whether A., who held immediately of the Crown, died without an heir, in which case the land must belong to the king by escheat; or whether B. be an idiot *a nativitate*, and, therefore, together with his lands, appertains to the custody of the king: and other questions of a like import, concerning both the circumstances of the tenant, and the value or identity of his lands.

These inquests of office were frequently in use, during the continuance of the military tenures. For, upon the death of any tenant of the Crown, such an inquest was held, called an *inquisitio post mortem*, to inquire of what lands such tenant died seised, who was his heir, and of what age; in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantage, as the circumstances of the case might turn out. To superintend and regulate these inquiries, the Court of Wards and Liveries was instituted by the 32 Hen. VIII. (1540), c. 46; but that court was abolished, at the restoration of King Charles the Second, with the abolition of the tenure in chivalry, *i.e.*, by knight's service.

Inquests of office, however, still remain in force, and are taken upon proper occasions, being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure trove, and the like;] and, until recently, a frequent occasion for them was to ascertain forfeitures for offences. But this latter occasion no longer exists, since, by the Forfeiture Act, 1870, no verdict or judgment of any treason, felony, or *felo de se*, now causes any forfeiture or escheat (*r*).

[These inquests of office were devised by the law as an authentic means to give the king his right by solemn matter of record. For it is a part of the liberties of England,

(*r*) 33 & 34 Vict. c. 23, s. 1.

[and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions, upon bare surmises, without the intervention of a jury (*s*). And, therefore, by the 18 Hen. VI. (1439), c. 6, all grants of forfeited lands and tenements, before *office found*, are declared void; and, by the Bill of Rights (1 W. & M. sess. 2, c. 2), all grants and promises of fines and forfeitures of particular persons before *conviction* are also declared void, which indeed was the law of the land as early as the reign of Edward the Third (*t*).]

There are cases, however, in which the Crown is entitled without office found, the inquest (if held) being only for the better instruction of the officer before seizure, and to protect the subject from the adoption of hasty measures (*u*). And though the rule formerly was, that where a common person cannot have possession without entry, the king cannot have it without an office, yet now it is otherwise (*x*). For, by the Queen's Remembrancer Act, 1859, section 25, when any right of re-entry upon lands or other hereditaments shall have accrued to the Crown, such right may be exercised or enforced, without any inquisition taken or office found, and without any actual re-entry being made on the premises.

[As to the effect of these inquests when taken, it may be laid down as generally true with regard to real property, that, if an office be found for the king, and the land be not held at the time by a stranger, the finding puts the Crown into immediate possession, without the trouble of a formal entry; and the Crown shall receive all the mesne or intermediate profits from the time that its title accrued (*y*). But, by the *Articuli super cartas*, if the king's escheator or sheriff seize lands into the king's hand,

(*s*) *Sheffeild* v. *Ratcliffe* (1615), Hob. 334; Gilb. *Hist. Ex.* 132.

(*t*) 2 Inst. 48.

(*u*) Gilb. *Exch.* 109, 13, 4; 16 Vin. Ab. 79, *Office*, B.; 12 East, 102.

(*x*) Chit. *Prerog.* 249.

(*y*) Finch, L. 325, 326.

[without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him (*z*).]

In order to avoid the possession of the Crown acquired by the finding of such office, the subject may either have his petition of right, or may traverse the inquisition (*a*), the traverse putting the finding in issue, and being the speedier remedy of the two. And, under the provisions of the Crown Suits Act, 1865, section 52, in case the subject thinks himself aggrieved by any description of boundary or other finding on the inquisition, he is entitled also to file a statement of his objection thereto, which objection shall thereupon be directed by the court to be inquired into by a fit person ; and if the latter's return in writing differs in effect from the inquisition, the latter shall be deemed to be altered so as to conform with the return.

[Also, upon all debts of record due to the Crown, the king has his peculiar remedy by writ of *extent*, under which both the lands and the goods of the debtor may be taken at once, in order to compel the payment of the debt (*b*) ; and this proceeding is called an *extent*, from the words of the writ, which direct the sheriff to cause the lands and goods to be appraised at their full value (*extendi facias*), before they are delivered to satisfy the debt.] Crown debts of record include (1) by virtue of the 33 Hen. VIII. (1541), c. 39, section 50, debts due to the Crown on obligation or other specialty ; (2) by virtue of the 13 Eliz. (1571), c. 4, debts due from the accountants to the Crown specified in that Act ; and (3) by virtue of the Taxes Management Act, 1880, section 118, duties detained in the hands of tax collectors.

A writ of extent, for the recovery of the Crown's debt,

(*z*) 28 Edw. 1 (1300), c. 19.

(*a*) *In re Ann Parry, Ex parte Duke of Beaufort* (1866), L. R. 2 Eq. 95.

(*b*) 3 Rep. 12 b ; Gilb. *Ex. C.* 6 ; 2 Saund. by Wms. 70.

commissions the sheriff to take an inquisition (or inquest of office), to ascertain the lands goods and debts of the defendant, and to seize the same into the hands of the Crown. It has, however, in general, been held necessary, that the extent should be preceded by a *scire facias* (*c*), in order to bring the defendant into court, and afford him an opportunity of showing that the extent ought not to issue (*d*), though, in cases where there is any danger of the debt being lost, an *immediate* extent may issue, *i.e.*, an extent without either commission of inquest or *scire facias*, upon affidavit of the circumstances (*e*). In ordinary cases, the writ having issued, and the inquisition having been taken, and the seizure made under it by the sheriff, upon the same being returned into court, the defendant, if he means to dispute the debt, or any third person, who thinks proper to advance a claim to the property set forth in the inquisition, must enter an appearance for that purpose, when he will be permitted to plead to the extent (*f*) ; and, issue thereon having been joined either in law or in fact, the matter is decided according to the ordinary course of practice in actions between subject and subject.

With respect to the *effect* of an extent. First, the *lands* of a Crown debtor are bound, in general, from the time when the debt becomes one of record (*g*), which, in the case of such bonds as are mentioned in the 33 Hen. VIII. (1541), c. 39, section 50, is from the time the bonds are executed. And although, by the common law, debts (not of record) due from pubic officers and accountants to the Crown, bound the debtor's *lands*, only from the time they accrued due, yet (by the 13 Eliz. (1571), c. 4) arrears due

(*c*) Chit. *Prerog.* 271 ; Crown Office Rules (1886), r. 127.

(*d*) Chit. *Prerog.* 271.

(*e*) *Ibid.* 277 ; Crown Suits Act, 1865, s. 47.

(*f*) By 33 Hen. 8 (1541), c. 39, s. 55, the Crown debtor may allege or show any good and sufficient "matter in law, reason, or good "conscience," in bar or discharge of the debt.

(*g*) 2 Roll. Ab. 156, B. pl. 1.

from tellers, receivers, and such other officers as are in this behalf mentioned in the statute, are declared to bind the lands from the time when they entered into their offices (*h*). But now, by the Land Charges Act, 1900 (which repealed the Crown Suits Act, 1865, section 48), no debt due to the Crown, on any judgment, recognizance, inquisition of debt, obligation, or specialty, nor in respect of any acceptance of office under the Crown, is to operate as a charge on any land, unless or until a writ of execution for the purpose of enforcing it has been registered under the Land Charges Registration and Searches Act, 1888. As regards the *goods* of the debtor, they are bound from the *teste* (or date) of the extent (*i*), a rule which seems to apply also to any debts owing to the debtor (*k*); and, by the 33 Hen. VIII. (1541), c. 39, section 74, in suing out execution, the Crown's debt is preferred to that of every other creditor who has not obtained judgment before the Crown commenced its action (*l*).

With regard to the *exoneration* of lands from Crown debts, it has been provided, that whenever a *quietus* shall be obtained by a debtor or accountant to the Crown, and an office copy thereof has been left at the proper office, together with a certificate signed by the paymaster-general, that the same may be registered, the master shall forthwith enter the same in the proper book accordingly (*m*). And for this purpose, the lords of the treasury, (or any three of them,) may, by writing under their hands, upon payment of such sums as they shall

(*h*) *Wilde* v. *Forte* (1812), 4 Taunt. 334; Chit. *Prerog.* 294; Commissariat Accounts Act, 1821, s. 10.

(*i*) Chit. *Prerog.* 285; 1 Saund. by Wms. 219 g.

(*k*) See Chit. *Prerog.* 304; *R.* v. *Lambton* (1818), 5 Price, 428; *Spears* v. *Lord Advocate* (1838), 6 Cl. & F. 180.

(*l*) *Edwards* v. *The Queen* (1854), 9 Exch. 628; *Re Oriental Bank* (1884), 28 Ch. D. 643; *In re West London Commercial Bank* (1888), 38 Ch. D. 364.

(*m*) Judgments Acts, 1839, 1855; Law of Property Amendment Act, 1859, s. 22; Crown Debts and Judgments Act, 1860.

think fit into the receipt of his Majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the Crown, or upon such other terms as they may think proper, certify, that any lands, tenements, or hereditaments of any such debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, wholly exonerated from all further claim of the Crown; or, in the case of leases obtained on payment of fines, may certify, that the lessee shall hold the premises exonerated in like manner, without prejudice to the right of the Crown to the reversion upon such lease, and the rents and covenants incident to such reversion. And thereupon the same lands, tenements, and hereditaments shall respectively be held exonerated as aforesaid.

Such is, in general, the state of the law relating to the principal kind of extent, called an extent *in chief;* but a sub-variety of it, called an extent *in chief in the second degree*, may be here noticed, this latter being in the nature of a garnishee order, that is to say, a proceeding against the debtor of him against whom an extent in chief has issued. And the Extents in Aid Act, 1817, presently to be mentioned, not applying thereto (*n*), this extent is regulated (*mutatis mutandis*) like the extent in chief itself.

Besides the extent in chief (whether of the first or second degree), there is also an extent *in aid;* and this latter extent issues, not at the suit of the Crown, like an extent in chief, but at the suit or instance of the Crown debtor against a person indebted to the Crown debtor himself (*o*). This practice, of issuing extents in aid, was at one time carried to so great a length, as to enable Crown debtors, in almost every case, to convert to their

(*n*) *R.* v. *Shackle* (1823), 11 Price, 772; *R.* v. *Adams* (1848), 2 Exch. 299.

(*o*) *R.* v. *Gibbs* (1819), 7 Price, 633; *R.* v. *Tarleton* (1821), 9 Price, 647; *R.* v. *Kynaston* (1823), 11 Price, 598.

own benefit a species of execution properly belonging to the Crown, thereby obtaining an undue preference as regards other creditors. But the resort to extents in aid was subjected, by the Extents in Aid Act, 1817, to restraints which tended to the rectification of this abuse (*p*).

There is also a special writ of extent, which is applicable in the event of the death of a Crown debtor ; and which is called a *diem clausit extremum*, because it recites the death of the party (*q*). By this writ, which issues on an affidavit of the debt and death, the sheriff is commanded to take and seize the chattels, debts, and lands of the debtor who has so died, into the hands of the Crown (*r*).

[When the Crown hath unadvisedly granted anything by letters patent which ought not to be granted, or when the grantee hath done some act that amounts to a forfeiture of the grant, the remedy to repeal the patent used to be by writ of *scire facias* (*s*). This writ might be brought on the part of the Crown, in order to resume the thing granted ; but, if the grant was injurious to a subject, the Crown was *bound* to permit him, upon his petition, to use the royal name for repealing the patent, in a *scire facias* (*t*). And so also, if, upon office untruly found for the Crown, the land was granted over to another, he who was aggrieved thereby, and traversed the office itself, was entitled, before issue joined, to a *scire facias* against the grantee, in order to avoid the grant (*u*).] For this latter purpose, the remedy by *scire facias* is still available, as it also is for the repeal of letters patent

(*p*) No fiat for an extent in aid is issued, without an affidavit that there will otherwise be danger of the debt being lost to the Crown.

(*q*) *Ex parte Hippesley* (1816), 2 Price, 379 ; *R.* v. *Hodge* (1823), 12 Price, 537 ; *R.* v. *Hassell* (1824), M'Clel. 105 ; *R.* v. *Lord Crewe* (1836), 5 Dowl. 158.

(*r*) Crown Suits Act, 1865, s. 47.

(*s*) 3 Lev. 220 ; 4 Inst. 88.

(*t*) *R.* v. *Butler* (1680), 2 Ventr. 344.

(*u*) Bro. Ab. tit. *Scire Facias*, 69, 185.

generally ; but, in the case of letters patent for inventions, a petition in the nature of a *scire facias* for their repeal is now the proper remedy of the subject (*x*).

[An *information* on behalf of the Crown, exhibited by the attorney-general, is also a method of proceeding, for obtaining satisfaction in respect of an injury to any of the possessions of the Crown (*y*) ; and it is instituted, to redress a *civil* injury by which the property of the Crown is affected, differing in this respect from the criminal information which is filed in the King's Bench Division of the High Court, to punish some heinous misdemeanor in the defendant, immediately affecting the Crown, and not such as can be properly left to a prosecution by way of indictment (*z*). The most usual informations, of the description now under review, are those of intrusion (*a*), and of debt (*b*) : the information of *intrusion* being for any trespass committed on the lands of the Crown (*c*), as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, and the like, and the information of *debt* being for moneys due to the Crown upon the breach of a penal statute (*d*). This civil information is also commonly used, to recover forfeitures occasioned by transgressions of the revenue laws ; penalties inflicted by the laws which regard matters of police and public convenience being usually

(*x*) Patents Act, 1883, s. 26 ; *In re Avery's Patent* (1887), 36 Ch. D. 307.

(*y*) *Att.-Gen.* v. *Edmunds* (1868), L. R. 6 Eq. 381 ; *Lord Stanley* v. *Wild*, [1900] 1 Q. B. 256.

(*z*) *Vide post*, vol. IV. bk. VI. ch. XIV.

(*a*) 4 Rep. 58 a ; *Attorney-General* v. *Parsons* (1836), 2 M. & W. 23 ; *Attorney-General* v. *Hill*, *ib.* 160.

(*b*) *Attorney-General* v. *Sewell* (1838), 4 M. & W. 77.

(*c*) *Nannge* v. *Rowland ap Ellis* (1608), Cro. Jac. 212 ; *Lord Vaux's Case* (1586), 1 Leon. 49 ; *Attorney-General* v. *Lord Churchill* (1841), 8 M. & W. 171 ; *Attorney-General* v. *Hallett* (1847), 1 Exch. 211.

(*d*) See Crown Debts Act, 1801, as to enforcing, in Ireland, payment of Crown debts recovered in England, and *vice versâ*.

[left to be enforced in *qui tam* actions, *i.e.*, by common informers. But, after the attorney-general has informed upon a breach of the penal law, no other information can be received (*e*).

There is also an information *in rem*, when any goods are supposed to become the property of the Crown, and no man appears to claim them or to dispute the Crown's title; as, antiently, in the case of treasure-trove, wrecks, waifs, and estrays, seized by the Crown's officer for its use. For, upon such seizure, an information may be filed in the King's Bench Division, and thereupon a proclamation is made for the owner (if any) to come in and claim the effects. At the same time, a commission of *appraisement* issues, to value the goods in the officer's hands; and, after the return of the commission, and a second proclamation had, if no claimant appear, the goods are supposed derelict, and are condemned to the use of the Crown (*f*). And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by Act of Parliament for transgressions against the laws of the customs and excise, there was the same process, in order to secure such forfeited goods to the public use, though the offender himself should escape the reach of justice.]

Finally, we may remark, that by the Crown Suits Act, 1855 (*g*), the subject of costs in all legal proceedings, by or on behalf of the Crown in matters relating to the *public revenue*, was placed upon the same footing as the subject of costs in actions between subject and subject: though, by the general rule of law, as it stands independently of this statute, the Crown neither pays nor receives costs (*h*). And by the Crown Suits Act, 1865, the pro-

(*e*) Hard. 201.
(*f*) Gilb. *Exch.* ch. 13.
(*g*) 18 & 19 Vict. c. 90, ss. 1, 2.
(*h*) *Attorney-General* v. *Shillibeer* (1849), 4 Exch. 606; *R.* v. *Beadle* (1857), 7 El. & Bl. 492; *R.* v. *Canterbury* (*Archbishop*), [1902] 2 K. B. 503.

ceedings by way of information, and in other matters relating to the revenue, were simplified and assimilated, in many respects, to the procedure in an action (*i*) : and they have been further simplified by the Order of 1883, relative to this procedure (*k*), and by the Crown Office Rules, 1886 (*l*).

(*i*) Crown Suits Act, 1855, and Queen's Remembrancer's Act, 1859.

(*k*) Ord. LXVIII. r. 2.

(*l*) See Short and Mellor, *Crown Office Practice*.

CHAPTER XVIII.

OF THE INTERLOCUTORY PROCEEDINGS IN ACTIONS; AND OF PREROGATIVE WRITS.

DURING the regular course of an action divers proceedings (called interlocutory) may be, and commonly are, taken, some of them immediately after the issue, and even before the service, of the writ, but not usually until after such service. It will be convenient now to consider them; after which, we shall advert to certain extraordinary remedies, distinct in their nature from actions, and which are called *prerogative writs*, interlocutory proceedings and prerogative proceedings being both capable of being commenced by way of *motion*, although proceedings of the class called interlocutory are now generally taken on *summons* (*a*).

I. *Ordinary Interlocutory Orders.*—A *motion* is an application made to a Divisional Court or a judge, *viva*

(*a*) For example, the following applications:—(1) For extensions of time to plead, or to do any other act for which time is extendible; (2) For leave to amend the writ or pleadings; (3) For orders for discovery or the production and inspection of documents, and for the inspection of property; (4) For the appointment of guardians *ad litem*, in the case of infants and lunatics not so found being defendants; (5) For leave to issue writ of summons for service out of jurisdiction; (6) For order to take ordinary account; (7) For order to sign final judgment where writ is specially indorsed with particulars of debt or liquidated demand; (8) For directions generally, under Ord. XXX. And see also Ord. LIV. (proceedings in chambers generally); and Ord. LV. (proceedings in chambers, Chancery Division).

voce, in open court (*b*); and it can be made, in general, by any one on his own behalf, but, unless made by the party himself, it can only be made by counsel, to the exclusion of solicitors, save in bankruptcy. An application to a judge or master in chambers is made by a *summons*, which is a document setting out the *order* which the party issuing it desires to obtain, and calling on the opposite or other party to attend before the judge or master at a stated day and time, on the hearing of an application for such order. A motion or summons is often supported by an *affidavit* of the matters of fact on which it is founded (*c*). The object of the motion or summons is, in general, to obtain an order directing, in favour of the applicant, some act to be done or abstained from by some other person, which order, when obtained, has generally to be served upon the party affected by it.

Formerly, applications to the court were usually made *ex parte*, that is to say, without in the first instance calling on the other side to attend. This is still done in some cases.

(*b*) Under the Judicature Acts, two or more of the judges of the High Court sitting together are termed a Divisional Court (corresponding to the old sittings in *banc*); and certain matters are prescribed to be determined by a Divisional Court, instead of by a single judge, *e.g.*, proceedings on the Crown side of the King's Bench Division, appeals from the county courts, proceedings under any statute wherein the decision of the court is final, and, formerly, appeals from the judge at chambers in the King's Bench Division (Act of 1873, s. 41; Act of 1875, s. 17; and Ord. LIX. r. 1). But these latter appeals now go to the Court of Appeal direct (Judicature Act, 1894, s. 1), at least in matters of practice and procedure.

(*c*) *Affidavits* are made on various occasions; and, by the Judicature Acts, it is provided, that, on any *motion*, *petition*, or *summons*, evidence may be given by affidavit, subject to an order for the attendance for cross-examination of the person making such affidavit on the application of either party, and that affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on *interlocutory* motions, on which statements as to his belief, with the grounds thereof, may be admitted (Ord. XXXVIII. rr. 2, 3).

When the application is made *ex parte*, the court grants what was called a *rule*. A rule is either a rule to *show cause* (otherwise called a rule *nisi*), commanding the party, on a certain day therein named, to show cause to the court, why he should not perform the act or submit to the terms therein set forth; or else it is a rule *absolute in the first instance*, commanding the thing to be done, without the appointment of any day to show cause. If the rule be a rule *nisi*, the counsel for the party on whom it has been served, appears on the day appointed, and is heard in opposition to it, and, the counsel by whom it was moved having been afterwards heard in reply, the court either discharges the rule, or makes it absolute, as the case may be; but if the party served with the rule fail to appear in opposition to it, it is made absolute as a matter of course. And, in either case, the rule absolute is then served on the party ruled; and he is bound to obey it, upon peril of being attached for contempt.

Prior to the Judicature Acts, the great majority of motions were for a rule to show cause, and were made *ex parte*; but now, under the practice as regulated by these Acts, every application, except where, under the former practice, it would have been for a rule absolute in the first instance, must be preceded by a notice to the party to be affected thereby (*d*); and no rule or order to show cause is granted *in any action*, except in such cases as are expressly authorized by the Rules of Court (*e*).

A common ground for an interlocutory application is where an interim injunction is wanted to stay the completion of some act; or where an interim receiver is wanted to receive, and to hold *in medio*, moneys or securities, the title to which is in dispute in the action. And it is provided by the Judicature Act, 1873, section 25 (8), that

(*d*) Ord. LII. r. 3.

(*e*) Ord. LII. r. 2. The appeal from a county court to a divisional court is now also by motion *on notice* (County Courts Act, 1888, ss. 120, 125; Ord. LIX. rr. 9—17).

an injunction may be granted, or a receiver appointed, by an interlocutory order of the court, in all cases where it shall appear to the court to be *just and convenient* to do so (*f*). The application may be made either by the plaintiff or by the defendant; by the plaintiff either *ex parte* or on notice, but usually on notice, and by the defendant on notice only. And if by the plaintiff, then even before the defendant's appearance to the writ of summons; but if by the defendant, only after his appearance to the writ (*g*).

When by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the court or a judge (*h*) may make an interlocutory order for the preservation or interim *custody* of the subject-matter of the litigation, or may order that the amount in dispute be brought into court or otherwise secured (*i*); and the court or a judge may also make an order for the *detention*, *preservation*, or *inspection* of any property being the subject of the action, and may authorize any persons to *enter* upon or into any land or building in the possession of either party to the action; and, for all or any of the purposes aforesaid, may authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence (*k*). Again, the court or a judge may, on the application of either party to the action, make an order for the *sale* of any goods, wares, or merchandize, which may be of a perishable nature, or likely to injure from keeping, or

(*f*) *Beddow* v. *Beddow* (1878), 9 Ch. D. 89; *Day* v. *Brownrigg* (1878), 10 Ch. D. 294.

(*g*) Ord. L. r. 6.

(*h*) This expression, except in a few cases, gives a master power to make the order, and, as a matter of practice, an application at chambers, except in those few cases, is always made in the first instance to a master. The excepted cases include orders for service out of the jurisdiction, for injunction, for receiver, for a writ of *habeas corpus*, and some others (Ord. LIV. r. 12).

(*i*) Ord. L. r. 1.

(*k*) *Ibid.* r. 3.

which for other just and sufficient reason it may be desirable to have sold at once (*l*).

II. *Interpleader.*—Sometimes a person has in his possession goods or money which are or is claimed by different persons, and he is in doubt who is entitled to them or it. This may happen in the case of an ordinary individual, or of a sheriff who has seized goods which some person says do not belong to the judgment debtor. In either case, the person or sheriff can get out of his difficulty by *interpleader* proceedings. That is to say, he can make an application at chambers, calling on the rival claimants to appear and state the nature of their claims. A defendant may make that application at any time after being served with the writ of summons, and before delivering his defence (*m*); and the sheriff may interplead, where his levy at the suit of the execution creditor is hindered by some person (other than the execution debtor) claiming the goods seized (*n*). Where the defendant is the applicant in interpleader, the judge or master usually stays all further proceedings in the action (*o*); and, on the hearing of the application, either summarily disposes of the question, where both parties consent, or where (the matter being a small one) either party requests that mode of decision (*p*), or will put the issue of fact or of law in a formal shape for trial (*q*). The decision on such an issue is always appealable, although the summary decision is not appealable, even by leave (*r*). Under the provisions of the Judicature Act, 1884 (47 & 48 Vict. c. 61), section 17, interpleader proceedings in the High Court, in which the amount or value of the matter in dispute does not exceed 500*l*., may be removed into the county court, by order of the High Court.

III. *Prerogative Writs.*—The principal of these writs

(*l*) Ord. L. r. 2.
(*m*) Ord. LVII. r. 4.
(*n*) *Ibid.* r. 1.
(*o*) *Ibid.* r. 6.
(*p*) Ord. LVII. r. 8.
(*q*) *Ibid.* rr. 7, 9.
(*r*) *Ibid.* r. 11; *Lyon* v. *Morris* (1887), 19 Q. B. D. 139.

are (1) The writ of *scire facias;* (2) The writ of *procedendo;* (3) The writ of *mandamus;* (4) The writ of *prohibition;* (5) The writ of *quo warranto;* (6) The writ of *habeas corpus;* and (7) The writ of *certiorari.* We shall shortly consider each of these seven prerogative writs.

(1.) *Writ of Scire Facias.*—This was a writ founded on some record, requiring the person against whom it was brought, to show cause why the party bringing it should not have advantage of the record, or else, why the record should not be annulled and vacated (*s*). An instance of the former species was brought in order to obtain restitution after a judgment had been reversed on appeal (*t*); and of the latter species, when the writ was not supplementary to an action, but was an independent and original proceeding, as a *scire facias* (and now a petition in the nature thereof) to repeal a patent (*u*), or a *scire facias* to make the individual members of a company liable upon a judgment recovered against their public officer, sued as representing the company. No specific mention of a *scire facias* is made in the Judicature Acts; but as it was considered in law an action (*s*), it may be presumed that, in ordinary civil cases, the proceedings would now be commenced by a writ of summons.

(2.) *Writ of Procedendo.*—[This writ issues when the judge of an inferior court doth delay the parties, neglecting to give judgment, either on the one side or the other, when he ought so to do (*x*). In such a case, a *procedendo ad judicium* shall be awarded, commanding the inferior court, in the name of the Crown, to proceed to judgment;

(*s*) Arch. *Practice* (14th ed.), p. 1285.

(*t*) C. L. P. Act, 1852, s. 132.

(*u*) Petty Bag Act, 1849, s. 29; Patent Law Amendment Act, 1852, s. 15; Patents, etc. Act, 1883, s. 26.

(*x*) F. N. B. 153, 240. In some cases an order directing the judge to do what is required of him is substituted by statute for the older method of procedure. (See *post*, p. 687, n. (*f*).

[and, upon further neglect or refusal, the judge of the inferior court may be punished for his contempt, by writ of attachment returnable in the High Court.] A *procedendo* may also be awarded out of the High Court, where an action has been removed to it from an inferior court, and it appears to have been removed on insufficient grounds (*y*): and by the 21 Jac. I. (1623), c. 23, a suit once so remanded, shall not be again removed before judgment into any court whatsoever.

(3.) *The Writ of Mandamus.*—The power of issuing this writ (meaning the *prerogative* writ, as distinguished from the *mandamus* which was introduced by the Common Law Procedure Act, 1854 (*a*), and which latter may be described as a *mandamus incidental to an action or other proceeding*), belongs exclusively to the King's Bench Division of the High Court of Justice (*b*). [It is a high prerogative writ, of a most extensive remedial nature; and, in its form, it is a command issuing in the King's name, and directed to any person, corporation, or inferior court of judicature, within the Crown's dominions, requiring him or them to do some particular thing therein specified which appertains to their office and duty; and which the court has previously determined, or assumes, to be consonant to right and justice. In its application, it may be considered as confined to cases where relief is required in respect of the infringement of some *public* right or duty (*c*), and where no effectual relief can be obtained in the ordinary course of an action or by other

(*y*) 21 Jac. I (1623), c. 23; Jac. Dict. *Procedendo*; *Garton* v. *Great Western Rail. Co.* (1858), 1 El. & El. 258.

(*a*) 17 & 18 Vict. c. 125. Even prior to that Act, there was, for one purpose, a *mandamus* auxiliary to an action, viz., the *mandamus* to examine witnesses in India and other British dominions in foreign parts (East India Company Act, 1772, s. 44, and Evidence on Commission Act, 1831, s. 1).

(*b*) Act of 1873, s. 34; Ord. LIII. r. 5; Crown Office Rules, 1886, rr. 60—80; *Hayward* v. *East London Waterworks Co.* (1884), 28 Ch. D. 138.

(*c*) *R.* v. *Bank of England* (1819), 2 B. & Ald. 620.

[means (*d*). Such is the general principle ; but as to the specific instances in which the writ will be granted, they are much too numerous for complete detail here. Among other cases, this writ lies, to compel the admission or restoration of the applicant to any office or franchise of a public nature, whether spiritual or temporal, to academical degrees, to the use of a meeting house, or the like ; and it will also be granted for the production, inspection, or delivery of public books and papers ; or to compel the surrender of the regalia of a corporation ; or to oblige bodies corporate to affix their common seal ; or to compel the holding of a court, or the holding of an election to corporate and other public offices (*e*). In addition to which, we may notice, as another important application of this writ, that a mandamus (or an order in the nature thereof) will issue to the judges of inferior courts, commanding them to do justice according to the power of their office, whenever the same is delayed (*f*) ; for it is the peculiar business of the King's Bench to superintend inferior tribunals, and to enforce therein the due exercise of those judicial or ministerial powers with which the Crown or legislature has invested them, and

(*d*) *R.* v. *Bishop of Chester* (1786), 1 T. R. 396 ; *R.* v. *Lancashire and Yorkshire Rail. Co.* (1852), 1 El. & Bl. 228. It is no objection to granting a *mandamus*, that the party against whom the complaint is made may be proceeded against by *indictment* (*R.* v. *Severn Rail. Co.* (1819), 2 B. & Ald. 646) ; but the existence of a specific and adequate civil remedy is an objection to the issue of a *mandamus* (*In re Nathan* (1884), 12 Q. B. D. 461 ; *R.* v. *Registrar of Joint Stock Companies* (1888), 21 Q. B. D. 131 ; *Rex* v. *Stepney Borough Council*, [1902] 1 K. B. 317).

(*e*) *R.* v. *Norwich* (1830), 1 B. & Ad. 310.

(*f*) Under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 131, repealing and re-enacting a former provision to the like effect contained in the Act of 1856, s. 43, no writ of *mandamus*, but only an order or summons in the nature of a *mandamus*, shall issue to a judge or officer of a county court, *for refusing to do any act relating to the duties of his office* ; and the same is the course with regard to a *stipendiary* or other magistrate (Justices Protection Act, 1848, s. 5).

[this, not only by restraining their excesses, but also by quickening their diligence, and obviating their denial of justice (*g*).

The writ is granted on a suggestion, upon the oath of the party injured, of his own right, and the denial of justice elsewhere, a refusal being one of the essentials to the issue of the writ (*h*) ; and in order more fully to satisfy the court that there is good ground for such interposition, a rule *nisi* is made,—except under particular circumstances, where a rule will be granted absolute in the first instance (*i*),—directing the party complained of, to show cause why a writ of *mandamus* should not issue. And if he shows no sufficient cause, and does not submit without contest to the application, the writ itself is issued at first in the alternative, either to do this or else to signify some reason to the contrary, to which a *return* or answer must be made at a certain day. If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment ; and if he makes a return, and it be found either insufficient in law or false in fact, there then issues in the second place a *peremptory mandamus* to do the thing absolutely, to which no other return will be admitted, but a certificate of perfect obedience to, and compliance with, the writ (*k*).]

The sufficiency of the return, in *point of law*, was formerly determined, unless a special argument were ordered, in a summary way upon motion ; but as to the truth of its allegations *in point of fact*, it was a rule, that this could not be investigated by any further proceeding on the *mandamus*, the complaining party having no remedy in case the facts were untruly alleged, save that

(*g*) *R.* v. *Cotham*, [1898] 1 Q. B. 802.

(*h*) *R.* v. *Brecknock, etc. Co.* (1835), 3 A. & E. 217.

(*i*) *R.* v. *Archdeacon of Lichfield* (1835), 5 Nev. & M. 42 ; Common Law Procedure Act, 1854. s. 76 ; Crown Office Rules (1886), rr. 60—79.

(*k*) *R.* v. *Ledgard* (1841), 1 Q. B. 616.

of an action on the case for a false return, in which action, if he obtained a verdict, he recovered damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant. But it was provided, by the 1 Will. IV. (1831), c. 21, that in all cases of *mandamus*, the return might be pleaded to or traversed by the prosecutor, and that his antagonist might reply, take issue, or (in effect) demur, and the same proceedings be had, as if an action had been brought for making a false return. So that now the writ of *mandamus* is, (from the period at least of its return,) assimilated to an action; and the more closely, because it is also provided, that the prosecutor, if successful, shall recover damages, and that the successful party shall, in all cases, upon judgment after issue joined or by default, be entitled to his costs (*l*). In addition to which, it was enacted, by the 6 & 7 Vict. (1843), c. 67, that a prosecutor objecting to the validity of the return, should do so by way of demurrer to the same, in like manner as in an action; and thereupon the writ, return, and demurrer should be entered on record, and the court should adjudge, either that the return was valid in law, or that it was not valid in law, or that the writ of *mandamus* itself was not valid in law. And if the court adjudged that the writ was valid, but the return invalid, it was to proceed to award a peremptory *mandamus*; and also, in any event, costs to be paid to the successful party (*m*). And though these statutes have been themselves repealed (*n*), yet, under the present practice, the invalidity of the return in point of law must now be raised in the

(*l*) *R.* v. *Oundle* (1834), 1 A. & E. 283; *R.* v. *Governors of Darlington School* (1844), 6 Q. B. 682; *R.* v. *Ambergate Rail. Co.* (1852), 17 Q. B. 957; *R.* v. *Ingham* (1852), 17 Q. B. 884.

(*m*) The provisions of the Common Law Procedure Acts, 1852 and 1854, were applied (so far as they were applicable) to the proceedings and pleadings upon a prerogative writ of *mandamus* (Act of 1854, s. 77; and see Crown Office Rules (1886), rr. 77, 78).

(*n*) Statute Law Revision Act, 1891; Judicature Act, 1883, ss. 3, 7.

answer to the return, as on the pleadings, and will be disposed of as a like question raised in a purely civil proceeding (*o*).

Besides these provisions, we may notice an enactment of the 1 & 2 Will. IV. (1831), c. 58, section 8, whereby, in favour of officers and other persons to whom a writ of *mandamus* is directed to issue, commanding them to admit to offices, or to do or perform other matters in respect of which they claim no right or interest, it is provided, that it shall be lawful for the court to which application is made for the writ, to relieve them from the liabilities incident to the execution thereof, by calling upon any other person having or claiming any interest in the matter to appear and show cause against the issuing of the writ; and thereupon the court may make such rules and orders between all parties as the circumstances of the case may require. And this provision has been adopted by the Judicature Acts (*p*).

As regards the *mandamus* which (as above is mentioned) was introduced by the Common Law Procedure Act, 1854, it may be convenient here to mention, that the plaintiff in any action, may indorse upon his writ of summons a notice that he intends to claim a writ of *mandamus*, commanding the defendant to perform some duty in which the plaintiff is interested, and to enforce which there is no other remedy (*q*); and judgment may be given commanding the defendant forthwith to perform the duty (*r*). In case of disobedience, the offender may be attached, or the court may direct the act to be done by the plaintiff, or by some person appointed for the purpose by the court, at the expense of the defendant; and when the

(*o*) Crown Office Rules (1886), r. 70.

(*p*) Act of 1883, ss. 3, 7; Crown Office Rules (1886), r. 73.

(*q*) 17 & 18 Vict. c. 125, ss. 68—76; *Benson* v. *Paull* (1856), 6 Ell. & Bl. 273; *Ward* v. *Lowndes* (1859), 1 El. & El. 940; *Bush* v. *Beavan* (1862), 1 H. & C. 500; Ord. LIII. r. 1; *R.* v. *Lambourn Valley* (1889), 22 Q. B. D. 463; *R.* v. *L. & N. W. Rail. Co.*, [1894] 2 Q. B. 512.

(*r*) Ord. LIII. rr. 1—4.

act required by the judgment of the court to be done is the execution of any conveyance, contract, or other document, or the indorsement of any negotiable instrument, the Judicature Act, 1884 (*s*), section 14, has adopted this alternative provision. With reference to this species of *mandamus*, the Judicature Acts have provided, that a *mandamus* may be granted, by an *interlocutory* order of the court, in all cases in which it shall appear to the court to be just or convenient that such order should be made (*t*); and such order may be made, either unconditionally, or upon such terms and conditions as the court shall think just. But no *writ* of *mandamus* now issues in such a case; the judgment or order itself, which commands the defendant to do the act, having the same effect as the old *writ* (*u*).

(4.) *The Writ of Prohibition.*—[This writ is directed to the judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a surmise, either that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court (*x*). The writ may issue to any species of inferior court, if it concerns itself with some matter not within its jurisdiction (*y*); or if, in handling matters clearly within its cognizance, it transgresses the bounds prescribed to it by the laws of England (*z*). As where a spiritual court

(*s*) *Re Edwards* (1885), 33 W. R. 578; *Howarth* v. *Howarth* (1886), 11 P. D. 68.

(*t*) Act of 1873, s. 25, sub-s. (8); Ord. L. r. 6; *In re Paris Skating Rink Company* (1877), 6 Ch. D. 731.

(*u*) Order LIII. rr. 3, 4.

(*x*) *Tucker* v. *Inman* (1842), 4 Man. & G. 1049; *Re Dean of York* (1841), 2 Q. B. 1.

(*y*) *R.* v. *Lincolnshire County Court Judge* (1887), 20 Q. B. D. 167.

(*z*) If sentence has been given in the court below, the superior court will presume that there was no excess of jurisdiction unless such excess be distinctly proved, or be apparent on the face of the proceedings (*Hart* v. *Marsh* (1836), 5 A. & E. 591; *Broad* v. *Perkins* (1888), 21 Q. B. D. 533). As a

[requires two witnesses to prove a release or payment of tithes (*a*), or the like (*b*); for as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in such courts because incident or accessory to some original question clearly within their jurisdiction, it ought therefore, where the two laws differ, to be decided not according to the spiritual, but according to the temporal, law. Else the same question might be determined in different ways, according to the court in which the suit is depending,—an impropriety which no wise government can or ought to endure, and which is therefore a ground of prohibition.]

The method of proceeding in prohibition is as follows (*c*). The party aggrieved in the court below applies to the High Court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom. And this used formerly to be done by filing, as of record, a *suggestion*, containing a formal statement of the facts; but, by the 1 Will. IV. (1831), c. 21, it was provided, that it should not be necessary to file any suggestion, but that an application for a prohibition might be made on *affidavits* only, as on an ordinary summons. Upon which, if the matter alleged appear to the court to be sufficient, the prohibition immediately issues, com-

county court has, in winding-up matters, all the jurisdiction of the High Court, there can be no prohibition in such a case to the county court (*In re New Par Consols*, [1898] 1 Q. B. 669).

(*a*) *Mallary* v. *Marriott* (1599), Cro. Eliz. 666; Hob. 188.

(*b*) A prohibition will not be awarded in respect of a mere point of *practice* (*Ex parte Smyth* (1835), 1 Tyr. & G. 227; *Jolly* v. *Baines* (1840), 12 A. & E. 201; *Ex parte Story* (1852), 12 C. B. 767).

(*c*) No mention is made in the Judicature Acts of a prohibition; but in Order LIV. r. 12, it is mentioned as one of the matters which cannot be dealt with at chambers by a *master*, and by Ord. LXVIII. rr. 2—4, the practice in an ordinary civil proceeding is, to the specified extent, made applicable to prohibition. And see Crown Office Rules, 1886, rr. 81, 82.

manding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition may be directed by the court to deliver a statement (formerly called the *declaration in prohibition*), setting forth, in a concise manner, so much of the proceeding in the court below as may be necessary to show the ground of the application, and praying that a prohibition may issue (*d*). And to the above statement, the defendant might have demurred, or raised such other defence as was proper to show that the writ ought not to issue; and in case a verdict on an issue of fact raised on such statement was given for the plaintiff, the jury assessed damages (*e*). Consequently, the effect of the provisions of the 1 Will. IV. (1831), c. 21, was to place prohibitions, unless disposed of, as was more generally the case, on the application itself, substantially upon the footing of an action; and it has been expressly provided by the Rules of the Supreme Court (*f*), that the particular provisions therein specified shall apply to proceedings in prohibition equally as to purely civil proceedings, and that when pleadings are ordered, they, and all subsequent proceedings therein, shall, as nearly as may be, correspond with the pleadings and subsequent proceedings in an ordinary action. After a prohibition has been granted, if either the judge of the court below, or any party to the cause or proceeding pending therein, shall proceed in disobedience to it, an attachment may be had against him

(*d*) 1 Will. 4 (1831), c. 21, s. 1; *Remington* v. *Dolby* (1844), 9 Q. B. 176; *Worthington* v. *Jeffries* (1875), L. R. 10 C. P., *per cur.*, p. 386. With regard, however, to applications for a prohibition to a *county court* (which are usually made at chambers), it has been provided, by the County Courts Act, 1888, s. 128, that the matter shall be finally disposed of by the rule or order, without any declaration in prohibition.

(*e*) *White* v. *Steele* (1862), 13 C. B. (N.S.) 231.

(*f*) Ord. LXVIII.; see rr. 2—4.

to punish him for the contempt ; and an action for damages will also lie at the suit of the injured party (*g*).

(5.) *The Writ of Quo Warranto.*—[The writ of *quo warranto* was in the nature of a writ of right for the Crown, against him who claimed or usurped any office, franchise, or liberty, to inquire, in order to determine the right, by what authority he supported his claim (*h*). It lay also in case of non-user or long neglect of a franchise, or mis-user or abuser of it, commanding the defendant to show by what warrant he exercised the franchise, having never had any grant of it, or else having forfeited it by neglect or abuse. The writ of *quo warranto* was originally returnable before the king's justices at Westminster (*i*) ; but afterwards, by virtue of the statutes of *quo warranto* (6 Edw. I. (1276), c. 1 and 18 Edw. I. (1290), st. 2), only before the justices in eyre. But after those justices gave place to temporary commissioners of assize, *i.e.*, those issued to the judges on the several circuits, this branch of those statutes lost its effect ; and writs of *quo warranto* were then (as before) prosecuted and determined before the king's justices at Westminster. In case of judgment for the defendant, he had an allowance of his franchise ; but in case of judgment for the Crown, that the party was entitled to no such franchise, or had disused or abused it, the franchise was either seized into the king's hands, to be granted out again to whomsoever he should please, or, if it were not such a franchise as might subsist in the hands of the Crown, there was merely judgment of *ouster*, to turn out the party who usurped it (*k*). The judgment in *quo warranto* was final and conclusive, even against the Crown. Which, together with the length of its process, probably occasioned that

(*g*) F. N. B. 40 ; 2 Inst. 601—618.

(*h*) Finch, L. 322 ; 2 Inst. 282.

(*i*) *Old. Nat. Brev.* fo. 107, edit. 1534.

(*k*) 2 Inst. 498 ; Rast. *Entries*, 540 ; *R.* v. *Stanton* (1610), Cro. Jac. 259 ; *R.* v. *Mayor of London* (1691), 1 Show. 274.

[disuse into which it gradually fell: and introduced the modern method of proceeding in similar cases, *i.e.*, by information, filed by the attorney-general, *in the nature* of a writ of *quo warranto*, wherein the process is speedier, and the judgment not quite so decisive (*l*). This information is properly a *criminal* proceeding to punish the usurper, by a fine, for the usurpation of the franchise, as well as to oust him or seize it for the Crown (*m*). But it hath long been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only (*n*). It is there-

(*l*) Under the Judicature Acts, such informations (which formerly were always filed in the Court of King's Bench) belong exclusively to the King's Bench Division (Act of 1873, s. 34; Ord. LXVIII. r. 2).

(*m*) During the violent proceedings that took place towards the end of the reign of King Charles the Second, it was (among other things) thought expedient to new-model most of the corporations in the kingdom; for which purpose, many of those bodies were persuaded to surrender their charters, and informations in the nature of *quo warranto* were brought against others, as upon a forfeiture of their franchises by neglect or abuser of them. The consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and, during their state of anarchy, the Crown named all their magistrates. But this exertion of power, though strictly legal, caused great alarm; and it was thought necessary, at the Revolution, to bridle this branch of the prerogative, at least so far as regards the metropolis. Wherefore the statute 2 W. & M. (1690), c. 8, declared, that the franchises of the city of London should never thereafter be seized for any forfeiture or misdemeanor whatsoever.

(*n*) An information in *quo warranto* to try the title to an office which has determined, will not be granted (*Re Harris* (1837), 6 A. & E. 475); nor will that process be granted for a mere irregularity in an election not affecting the result (*R.* v. *Ward* (1873), L. R. 8 Q. B. 210). Nor does this remedy lie in respect of the office of guardian to a poor law union (*Re Aston Union* (1837), 6 A. & E. 784); or in respect of the office of clerk to the justices of a borough (*R.* v. *Fox* (1858), 8 Ell. & Bl. 939). But it lies in respect of the office of clerk to a statutory board of guardians (*R.* v. *St. Martin's-in-the-Fields* (1851), 17 Q. B. 149).

[fore, now, considered as a merely *civil* proceeding, in which a new trial may be had, although the verdict should have been for the defendant (*o*). And, under the provisions of the Municipal Offices Act, 1710, this proceeding is now available as between party and party, and without any intervention of the prerogative; for that statute permits an information, in the nature of a *quo warranto*, to be brought, with leave of the court (*p*), at the *relation*, *i.e.*, the instigation, of any person desiring to prosecute the same, who is then styled the *relator* (*q*), against any person usurping, intruding into, or unlawfully holding a franchise, or office, in any city, borough, or town corporate (*r*). The same Act provides also for the speedy determination of such information; and directs, that if the defendant be convicted, judgment of ouster, as well as a fine, may be pronounced against him, and that the relator shall pay, or shall receive, costs, according to the event of the suit (*s*).]

And as regards such civil proceedings in *quo warranto*, it has been provided, by the Municipal Corporations Act, 1882, that every application for the purpose of calling upon a person to show by what warrant he claims to exercise the office of mayor, alderman, or burgess, in any borough within the Municipal Corporations Act, must be made before the end of twelve months after the election of the defendant, or the time when he shall become dis-

(*o*) *R.* v. *Francis* (1788), 2 T. R. 484. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), did not apply to an information in *quo warranto* (*R.* v. *Seale* (1855), 5 El. & Bl. 1): but Ord. LXVIII. r. 2, applies the procedure in purely civil actions to proceedings in *quo warranto*, so far as regards affidavits, motions, appeals, and the like.

(*p*) *R.* v. *Parry* (1837), 6 A. & E. 810.

(*q*) The relator must swear an affidavit, to the effect that he is relator (Crown Office Rules, 1886, r. 54; *R.* v. *Hedges* (1840), 11 A. & E. 163; *R.* v. *Anderson* (1842), 2 Q. B. 740; *R.* v. *Greene* (1842), 2 Q. B. 460).

(*r*) An information in *quo warranto* cannot be brought against persons assuming to act as a corporation, unless at the instance of the attorney-general (*R.* v. *White* (1836), 5 A. & E. 613).

(*s*) *Lloyd* v. *The Queen* (1862), 2 B. & S. 656; Ord. LXVIII. r. 2.

qualified ; and that no election of a mayor shall be liable to be questioned, by reason of a defect in his title to the office of alderman or councillor to which he may have been previously elected, unless, within twelve months after his election, a rule shall have been applied for, calling upon him to show cause by what warrant he claimed to exercise such office ; and that every election to the office of mayor, alderman, councillor, or other corporate office, within any such borough, which shall not have been called in question within twelve months after such election, shall be deemed good and valid.

(6.) *The Writ of Habeas Corpus.*—This is the most celebrated writ in the English law, being the great prerogative remedy which the law has provided against violations of the right of personal liberty ; and though we have had occasion, in other parts of this work, to make some remarks upon *habeas corpus*, still, a more particular detail of its history, and of the practice connected with it, may here be acceptable (*t*).

The most important kind of *habeas corpus*, and the only one to which the attention of the reader is here specially invited, is that of *habeas corpus ad subjiciendum*, being the remedy used for the deliverance from illegal confinement (*u*). The writ is directed to any person who detains

(*t*) Blackstone notices (vol. iii. p. 128) three other writs (all of them now obsolete), for removing the injury of false imprisonment : —1st, The writ of *mainprize* (*manucaptio*), commanding the sheriff to take sureties (usually called *mainpernors*), for the appearance of the prisoner and to set him at large ; 2nd, The writ *de odio et atiâ*, commanding the sheriff to inquire, whether a prisoner charged with murder was committed on general cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will, with the view (if the latter was found to be the case) of afterwards issuing another writ to admit him to bail ; and 3rdly, The writ *de homine replegiando*, commanding the sheriff to replevy a man out of custody, in the same manner that chattels taken in distress may be replevied, upon security given that the prisoner shall answer any charge against him.

(*u*) The other kinds of the writ of *habeas corpus* mentioned in the books, are :—1. The *habeas corpus*

another in custody; and commands him to produce the body, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, (to do, submit to, and receive,) whatsoever the judge or court awarding such writ shall consider right in that behalf (*x*). This is a high prerogative writ, which existed at common law, though it has been improved, as we shall presently see, by statute; and it runs generally into all parts of the dominions of the Crown, wherever situate. But it has been provided, by the Habeas Corpus Act, 1862, that no writ of *habeas corpus* shall issue out of England, by authority of any judge or court therein, into any colony or foreign dominion of the Crown, wherein his Majesty has a lawfully established court with authority to grant and issue such writ, and with power to ensure its due execution throughout such colony or dominion (*y*). The writ will only issue on application made, supported by

ad respondendum, to bring up a prisoner confined by the process of an inferior court, to charge him with a fresh action in the court above; 2. *Ad satisfaciendum*, with a similar object when *judgment* in the inferior court has been had against the prisoner; 3. *Ad faciendum et recipiendum* (otherwise called a *habeas corpus cum causâ*), when, in an action in the inferior court, the defendant has been arrested, to remove the proceedings and bring up the body of the defendant to the court above; and 4. *Ad prosequendum, testificandum, deliberandum*, etc., when a prisoner has to be brought up to bear testimony in any court, or to be tried in the proper jurisdiction. The occasions for the use of the last have been diminished by the Criminal Procedure Act, 1853, s. 9, allowing prisoners to be brought up as witnesses by order of the judge; and by the Criminal Law Amendment Act, 1867, s. 10, making an analogous provision with regard to the removal of prisoners from gaol in order to take their trial; and by the Prisons Act, 1898, s. 11, which enables a secretary of state to order the attendance of a prisoner as a witness.

(*x*) St. Tr. viii. 142; *R.* v. *Batcheldor* (1839), 1 P. & D. 516; *S. C. nom. Leonard Watson's Case*, 9 A. & E. 731; *In re Parker* (1839), 5 M. & W. 32; *Carus Wilson's Case* (1845), 7 Q. B. 984; *R.* v. *Brenan* (1847), 16 L. J. Q. B. 289; *In re Dunn* (1847), 17 L. J. C. P. 97; *Re Andrews* (1847), 4 C. B. 226.

(*y*) *John Anderson's Case* (1861), 7 Jur. (N.S.) 122; *Ex parte Brown* (1864), 5 B. & S. 280.

affidavit of the facts, and after a rule or order made thereon (*z*) ; [for, as was argued by Lord Chief Justice Vaughan, it is granted on motion, because it cannot be had of course, and therefore there is no *necessity* to grant it, for the court ought to be satisfied that the party hath a probable cause to be delivered (*a*). And this seems the more reasonable ; because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner (*b*) ; so that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor, a felon, or a dangerous lunatic might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court. And, indeed, Sir Edward Coke, when chief justice, did not scruple, in the thirteenth year of James the First, to deny a *habeas corpus* to one confined by the Court of Admiralty for piracy, there appearing, upon his own showing, sufficient grounds to confine him (*c*). On the other hand, if a probable ground be shown, that the party is imprisoned without just cause and therefore hath a right to be delivered, the writ is then a matter of right, which "may not be denied, but must be granted to every "man that is committed, or detained in prison or otherwise "restrained, though it be by command of the king, or of "his privy council, or any other" (*d*),]—all which must, of course, be taken as being subject to any statutory provision, under which (as under the Custody of Children Act, 1891) a discretion is vested in the court or judge before whom the application is made (*e*).

[In a former part of these Commentaries, we expatiated

(*z*) *Hobhouse's Case* (1820), 3 B. & Ald. 420.

(*a*) *Bushell's Case* (1670), 2 Jon. 13.

(*b*) *Bourn's Case* (1619), Cro. Jac. 543.

(*c*) *R.* v. *Marsh* (1615), 3 Bulstr. 27 ; *White* v. *Wiltshire* (1619), 2 Roll. Rep. 137.

(*d*) 2 Inst. 615 ; Com. Journ. 1 Apr. 1628.

(*e*) *Vide supra*, vol. II. p. 339.

[at large on the personal liberty of the subject ; and it was then shown, that this right of personal liberty is a natural inherent right, which cannot be surrendered or forfeited unless for the commission of some crime, and which cannot be abridged without the special permission of the law. A doctrine coeval with the first rudiments of the English constitution, handed down to us from our Saxon ancestors, asserted after the Conquest, and confirmed by the Conqueror himself and his descendants ; and though sometimes a little impaired by the occasional despotism of princes, yet established on the firmest basis by the provisions of *Magna Carta*, and a long succession of statutes enacted under Edward the Third. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of political society, and in the end would destroy civil liberty ; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. It is this consideration which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, in order that the court, upon a *habeas corpus*, may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

And yet the court of King's Bench, early in the reign of Charles the First, relying on some arbitrary precedents (and those, perhaps, misunderstood), determined that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in a case where he was committed by the special command of the king, or by the lords of the privy council (*f*). This drew on a parliamentary inquiry, and produced the *Petition of Right*, in the third year of Charles the First (1628), which

(*f*) *The Five Knights' Case* (1627), St. Tr. vii. 136.

[recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council in pursuance of his Majesty's special command, under a general charge of "notable contempts and stirring up sedition against the "king and government," the judges delayed for two terms (including also the long vacation) to deliver any opinion, how far such a charge was bailable. And they eventually annexed to the grant of bail the condition of finding sureties for good behaviour.

The difficulties thus allowed to impede the application of the writ, gave rise to the statute 16 Car. I. (1640), c. 10, section 8; whereby it was enacted, that if any person was committed, though by the king himself in person, or by the privy council, or by any of the members thereof, he should have granted unto him, without any delay under any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the King's Bench or *Common Pleas:* which should thereupon, within three court days after the return was made, examine and determine the legality of such commitment, and do what to justice should appertain, in delivering, bailing, or remanding the prisoner. Yet still, in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new impediments were permitted to delay the release of the prisoner (*g*), the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum, &c.*, whereby the prisoner was discharged at the Old Bailey (*h*). Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy;

(*g*) St. Tr. vii. 471.

(*h*) *Crowley's Case* (1818), 2 Swanst. 1.

[for the party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third writ, called an *alias* and a *pluries*, were issued, before he produced the prisoner. And many other vexations shifts were practised, in order to detain state prisoners in custody; which abuses at length gave birth to the famous *Habeas Corpus* Act of 1679, (31 Car. II. c. 2,) which is frequently considered as another *Magna Carta* of the kingdom.

The statute enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any *crime*, (unless for treason or felony expressed in the warrant; or unless it appear, that he is charged as accessory before the fact to some felony, or upon suspicion thereof, or with suspicion of felony, which felony is plainly expressed in the warrant; or unless he is in prison on process in any civil cause), the lord chancellor or any of the judges in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and, upon the return made, shall discharge the party, if bailable, upon his giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writ shall be endorsed, as granted in pursuance of the Act, and signed by the person awarding it. 3. That the writ (whether issued in vacation, under the Act, or in term time, by virtue of the common law,) shall be returned, and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That any officer or keeper, neglecting to make due return, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one officer to another, without sufficient reason or authority, (as specified in the Act,) shall for the

[first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved; and be disabled to hold his office (*i*). 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence, under a penalty of 500*l.* 6. That every person committed for treason or felony, shall, if he requires it, in open court upon the first week of the next term, or the first day of the next session of *oyer* and *terminer* and general gaol delivery, be indicted in that same term or session, or else admitted to bail, unless, indeed, the witnesses for the Crown cannot be produced at that time; and that if acquitted, or if not indicted and tried in the term or session next following, he shall be discharged from his imprisonment for such imputed offence; and that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That if the lord chancellor or a judge shall deny the writ, on sight of a copy of the warrant of commitment, or upon oath made that such copy is refused, he shall forfeit to the party grieved the sum of 500*l.* And, 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places: and into the islands of Jersey and Guernsey (*k*).]

Such is the substance of this great and important statute, which extended (we may observe) only to the case of such commitments as can produce no inconvenience to public justice by a temporary enlargement of the prisoner, all other cases of unjust imprisonment being left, by that statute, to the remedy by *habeas corpus* as it existed at common law (*l*). But, at a later period, in order to render

(*i*) A person, sent over from Ireland under a warrant from the secretary of state for Ireland, charged with any offence, and committed to prison until he can be brought before a judge, is in general entitled to a copy of the warrant, under the *Habeas Corpus* Act, after it has been demanded (*Sedley* v. *Arbouin* (1800), 3 Esp. 174).

(*k*) *Carus Wilson's Case* (1845), 7 Q. B. 984; *R.* v. *Brenan* (1847), 16 L. J. Q. B. 289.

(*l*) "Even upon writs of *habeas* "*corpus* at the common law, it is

the common law writ more effectual in cases not within the operation of the Act of Charles the Second, it was provided by the Habeas Corpus Act, 1816 :—1. That where any person shall be restrained of his liberty, (other than for some criminal or supposed criminal matter,) not being a person imprisoned for debt, or by process in any civil suit, any one of the judges may, upon *affidavit* showing a probable and reasonable ground for complaint, award the writ in time of vacation directed to the person in whose custody the party is confined, the writ being made returnable immediately before himself, or any other judge. 2. That upon disobedience to the writ, the judge before whom it is returnable may issue a warrant to arrest the disobedient party, or party guilty in contempt. 3. That if the writ shall be awarded so late in vacation that it cannot be conveniently obeyed during vacation, the same may be made returnable in court on a certain day in the next term. 4. That if such writ shall be awarded so late that it cannot be conveniently obeyed during the term, the same may be made returnable in the then next vacation before any of the judges. 5. That though the return to the writ may be good in law, it shall be lawful for the judge before whom it is returnable, to proceed to examine into the truth of the facts ; and if it appears doubtful to him whether they be true or not, that it shall be lawful for him to let to bail the person so confined, upon his entering into a recognizance to appear in court in the term following, when the court may then proceed to examine into the truth of the facts in a summary way by *affidavit*, and may order and determine as to the discharge, bailing, or remanding of the party. 6. That the like proceeding for controverting the truth of the return

" now expected by the court, " agreeable to antient precedents " and the spirit of the Act of " Parliament, that the writ should " be *immediately* obeyed, without " waiting for any *alias* or *pluries ;* " otherwise an attachment will " issue " (*R.* v. *Cowle* (1759), 2 Burr. 834).

may be had in the case where the writ shall be awarded by the court itself, or be returnable therein. 7. That the several provisions aforesaid shall extend to all writs of *habeas corpus* awarded in pursuance of the Act of the thirty-first year of Charles the Second. And, 8. That a *habeas corpus*, issued under the Habeas Corpus Act, 1816, shall run into any county palatine, or cinque port, or other privileged place, or into the islands of Jersey, Guernsey, and Man, or into any port, harbour, road, creek, or bay, upon the coast of England or Wales, lying out of the body of any county (*m*).

[By which admirable regulations, the remedy seems now to be complete for removing the injury of illegal confinement; a remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of government. For it frequently happens in foreign countries, and has happened in England during the temporary suspension of the statute, that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.]

(7.) *The Writ of Certiorari.*—This writ issues from the High Court of Justice to the judge or officers of any inferior court of record, commanding them to return the proceedings in an action or matter therein depending, to the end that the applicant may have the more sure and speedy justice (*n*). This writ may be had not only in *civil* but also in *criminal* cases; but the consideration of the writ of *certiorari* in its relation to criminal cases belongs more properly to the next Book of these Commentaries, where it will, accordingly, be found noticed (*o*), and our attention is at present called to the writ in its relation to civil cases only. And here, its object is to obtain relief from some inconvenience supposed, in the particular case,

(*m*) Crown Office Rules (1886), rr. 235 to 249.

(*n*) Bac. Abr. *Certiorari* A; *Ex parte Phillips* (1835), 2 A & E. 586.

(*o*) *Vide, post*, vol. IV. bk. VI. chaps. X. and XV.

to arise from a cause being disposed of before an inferior jurisdiction, less capable than the High Court of rendering complete and effectual justice. At common law, the writ of *certiorari* issued as of right to remove any action from an inferior court to the High Court (*p*); but in the case of the county courts, borough courts of record, and some others, there are now statutes excluding the right or placing limitations upon it. The writ may, in any civil proceeding, be applied for on a variety of grounds, such, for example, as that difficult questions of law are likely to arise on the trial of the cause (*q*), which is the most usual ground, as regards all civil proceedings; or, where the action is to be tried before a jury, that no impartial jury can be obtained in the inferior court (*r*).

The writ will issue in (among other cases) the following. (1) To remove into the High Court, from the quarter sessions, the proceedings instituted before the justices for the removal of a settled pauper; and the High Court will then either affirm or quash the removal order, according to the law applicable to the case upon the facts given in evidence at the sessions. (2) To remove into the High Court a replevin action commenced in the county court, on the ground, either that difficult questions of law are involved, or that a question of title is involved which it is beyond the jurisdiction of the county court to entertain. However, the writ will not now issue as a matter of course; and, with regard to proceedings in the *county courts*, it has been provided, by the County Courts Act, 1888 (51 & 52 Vict. c. 43), section 126, that the writ of *certiorari*, removing proceedings therefrom, shall only issue if the High Court or a judge thereof shall deem it desirable that the cause shall be tried in the superior court, and then only upon

(*p*) *Edwards* v. *Liverpool Corporation* (1902), 86 L. T. 627.

(*q*) *Hunt* v. *Great Northern Rail. Co.* (1851), 2 L. M. & P. 268.

(*r*) *Symonds* v. *Dimsdale* (1848), 2 Exch. 533.

such terms as to payment of costs, giving security, or otherwise, as the court or judge shall think fit to impose.

And generally, with regard to the writ of *certiorari* to inferior courts, there are divers statutes which restrain the removal of frivolous cases for the purpose of vexatious delay. Thus, by 21 Jac. I. (1623), c. 23, it was enacted, that where the judge of an inferior court of record was a barrister of three years' standing, no cause (except as therein excepted) should be removed thence by any writ after issue joined; and, by the Inferior Courts Act, 1779, section 6 (as extended by the Imprisonment for Debt Act, 1827), no cause under the value of 20*l.* could be removed, unless the defendant gave security for payment of the debt and costs. And the schedule annexed to the Borough and Local Courts of Record Act, 1872, which schedule may be applied by Order in Council to any local court of record, contains an express provision, that no action shall be removed thence before judgment, except by leave of a judge, and on such terms as he shall think fit (*s*).

(*s*) 35 & 36 Vict. c. 86, sched. r. 12.

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